Supreme Court, U. S.
FILED
SEP 2 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-342

WILLIAM B. ORKIN AND
BOBBY CHARLES BOWEN,
Petitioners,

versus

THE STATE OF GEORGIA
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

Petitioners William B. Orkin and Bobby Charles Bowen respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of Georgia entered in this case on November 17, 1976, which affirmed the denial of the Petitioners' extraordinary motion for a new trial.

OPINIONS BELOW

The opinion of the Georgia Supreme Court, issued on January 27, 1976, affirming the Petitioners' conviction is reported at 236 Ga. 176 (223 S.E.2d 61) and is reprinted in pertinent part in Appendix A. The opinion of the Court of Appeals of Georgia is-

sued on November 17, 1976, which also constitutes the judgment entered by that court on that date, is reported at 140 Ga. App. 651 (231 S.E.2d 481) and is reprinted in Appendix B. The opinion of the Supreme Court of Georgia, issued on May 12, 1977, dismissing the writ of certiorari issued by that court as improvidently granted, is reported at 239 Ga. 334 (unofficial citation unavailable) is reprinted in Appendix C.

JURISDICTION

Judgment in this case was originally entered in the Court of Appeals of Georgia on November 17, 1976. Promptly thereafter, the Petitioners filed a motion for rehearing, which was denied without any formal written order on December 3, 1976. After their motion for rehearing was denied, Petitioners applied to the Supreme Court of Georgia for a writ of certiorari. That application was itself denied on January 28, 1977. On motion for reconsideration, however, the Petitioners' application for certiorari was granted on February 11, 1977. (A copy of the order of the Supreme Court of Georgia on reconsideration is reprinted in Appendix D.) After receiving briefs and hearing oral argument, the Supreme Court of Georgia dismissed its writ of certiorari as improvidently granted on May 12, 1977. When the Petitioners moved for a rehearing on that action, their motion was denied without formal written order on June 7, 1977. By leave of the Chief Justice of the Supreme Court of Georgia and pursuant to the rules of that court, the Petitioners then filed a second motion for rehearing which was denied without formal written order on June 30, 1977.

The jurisdiction of this Honorable Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. When the prosecution knowingly procures a telephone call to be made to a named person for the avowed purpose of obtaining from his own lips evidence without which he cannot be convicted, and when the prosecution omits the name of that person from its application for a warrant authorizing the surveillance of that telephone call, is there such a knowing violation of 18 U.S.C. §2518(1)(b)(iv) as to justify suppression within contemplation of footnote 23 of this Court's opinion in *United States v. Donovan*, 429 U.S. —, 97 St. Ct. 658 (No. 75-212, decided January 18, 1977).

2. Were the Petitioners denied Due Process of Law when the prosecution deliberately withheld evidence by which the Petitioners could have established a violation of 18 U.S.C. §2518(1)(b)(iv) and Criminal Code Georgia 26-3004(c), in consequence of which Georgia law would have mandated the suppression of the prosecution's most critical evidence?

3. Was Petitioner Orkin's Sixth Amendment right of confrontation violated when the hearsay declarations of his co-defendant, Bowen, were admitted into evidence against him under Georgia's co-conspirator exception and when Orkin could not cross examine Bowen as to the truth of those declarations?

4. Did Petitioner Orkin establish a prima facie case of discrimination in the selection of grand ju-

rors by showing that selection procedures assured that jury commissioners would learn the age of every potential grand juror and by showing that young adults were substantially underrepresented in the grand jury venire?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the following constitutional provisions and statutes which, to the extent not reprinted in pertinent part below, are reprinted in pertinent part in Appendix E:

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment Six to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."

Amendment Fourteen to the United States Constitution provides in Section I as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; *nor shall any State deprive any person of life, liberty, or property without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws." (emphasis added)

ACTS OF CONGRESS

18 U.S.C. §2518(1)(b)(iv) provides:

"(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

* * *

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted."

18 U.S.C. §2518(4)(a) provides:

"(4) Each order authorizing or approving the interception of any wire or oral communication shall specify —

(a) the identity of the person, if known, whose communications are to be intercepted."

18 U.S.C. §2518(10)(a) is reprinted in Appendix E.

ACTS OF THE GENERAL ASSEMBLY OF GEORGIA

Criminal Code of Georgia §26-3004(c) (Ga. Laws 1968, pp. 1249, 1328, as amended by Ga. Laws 1972, p. 615) (specifying requirements for electronic surveillance applications); Criminal Code of Georgia §26-3007 (Ga. Laws 1968, pp. 1249, 1334) (mandating the suppression of evidence obtained in violation of statutory requirements); Georgia Code of 1933 §§59-106 and 201, as amended (providing for the selection of grand jurors); and Georgia Code of 1933 §38-306, which provides as follows:

"After the fact of conspiracy shall be proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all."

STATEMENT OF THE CASE

The Petitioners seek review of a judgment of the Court of Appeals of Georgia affirming the denial of their extraordinary motion for new trial based upon newly discovered evidence. In addition, the Petitioners seek review of certain issues decided at an earlier stage of this case by the judgment of the Supreme Court of Georgia entered on January 27, 1976.

Petitioner William B. Orkin is a prominent Atlanta businessman whose reputation was untarnished until this case arose. Petitioner Bobby Charles Bowen is a life-long friend of Orkin who served as Orkin's caretaker and who lived on Orkin's estate for many years. After a joint trial in September,

1974, Orkin and Bowen were found guilty of conspiracy to murder Gerald Johnson, the husband of Orkin's former part-time secretary. In consequence, they were each sentenced to a term of five years imprisonment — the maximum sentence authorized for that offense by Georgia law.

The events of this case began on May 13, 1974, when Bowen had a discussion with his friend Gene Landrum, a detective on the Atlanta Police Department homicide squad. During a social visit at Bowen's house, Bowen offered Landrum $5,000 in cash if Landrum would kill an unnamed man who was "giving a lot of trouble" to someone Bowen identified only as "an old friend." Detective Landrum refused the offer but left open the possibility that he might later change his mind.

Over the next several days Landrum had a series of telephone conversations with Bowen which convinced him that Bowen meant what he said. As a result, Landrum reported the matter to the District Attorney of Fulton County, Georgia, on May 17, 1974. From that date on, the District Attorney and his assistants supervised the investigation of this case.

On June 12, 1974, Bowen telephoned Landrum and asked if Landrum had given any further thought to Bowen's "problem". After advising Bowen that he had found a man who might be willing to take the job, Landrum arranged for Bowen to meet the man that night in Landrum's presence. Landrum then recruited an acquaintance, a man named Culp, to

pose as a "hit man." When Landrum and Culp met with Bowen that night, Bowen repeated his offer. Once again he was refused, but he was told that Culp knew of a man who would probably accept. As the meeting ended, Bowen was led to expect a call as soon as the man had been contacted.

The next day, Landrum reported the events of the meeting to the District Attorney's office. Arrangements were then made to enlist Rex Armistead, an investigator on the staff of the Mississippi Attorney General, to act as a professional killer.

Armistead arrived in Atlanta on June 18, 1974, four days after Orkin had left the city for a family vacation in the Caribbean. Promptly upon his arrival, Armistead telephoned Bowen and set up a meeting with Bowen at Armistead's motel during the early morning hours of June 19, 1974. During that meeting Bowen named Gerald Johnson as the man he wanted killed. He also described Johnson's daily routine and gave Armistead $5,000 in cash.

At one point in the meeting Armistead pressed Bowen for a reason to explain why Bowen wanted Johnson killed. Bowen responded that Johnson had been giving trouble to a "friend" whom Bowen had "been with" for twenty-seven years. According to Bowen, he had begged his friend to let Bowen do him a favor, and this was what the friend had asked him to do. After Armistead had asked him a series of probing questions, Bowen identified his friend as "Orkin."

Later that same day, Armistead and Bowen had

two more phone conversations and a second meeting. When they met for the second time, Bowen provided Armistead with a shotgun, ammunition, a map of Atlanta, and an additional $2,500. On further probing by Armistead, Bowen affirmed that the "Orkin" whom Bowen had mentioned earlier was William Orkin, Bowen's employer. Armistead was told that Orkin was out of the country but that Bowen and Orkin communicated daily by telephone. At the second meeting between Armistead and Bowen, and in their several telephone conversations, Orkin's name was repeatedly mentioned by both Armistead and Bowen in such a way as to indicate that Orkin had full knowledge of Bowen's actions and was being kept abreast of their negotiations.

All of the conversations between Bowen and Armistead were monitored and recorded by investigators of the District Attorney's office.

At 6:40 p.m. on June 20, 1974, representatives of the District Attorney's office obtained a warrant authorizing them to conduct a surveillance of Bowen's telephone line. Neither the application for that warrant nor the warrant itself identified William B. Orkin as a person whose communications were to be intercepted, even though Orkin was Bowen's only suspected co-conspirator.

Later that night, a conversation betwen Orkin and Bowen was intercepted during which an ambiguous reference was made to an "other thing" and to Orkin's desire to "sit down and have a chat" with a person who "might know too much." As soon as that conversation ended, Armistead was ordered to

telephone Bowen, to advise him that Johnson had been killed, and to demand more money. Once Armistead had carried out those instructions, the District Attorney's agents intercepted a second conversation between Bowen and Orkin. In that conversation Bowen stated that, "As quick as you hung up the phone he called me and he is down." To that Orkin responded, "You're kidding." Both conversations between Orkin and Bowen, as well as the intervening conversation between Bowen and Armistead, were recorded by authority of the wiretap warrant.

On the following day, June 21, 1974, Orkin and Bowen were indicted by the Grand Jury of Fulton County, Georgia.

After that date but before the Petitioner's trial began, motions to suppress the various recorded conversations were filed on behalf of Orkin and Bowen by their respective counsel. Among other grounds, those motions asserted that the June 20, 1974, conversations between Orkin and Bowen had been unlawfully intercepted for the reason that Orkin had not been named in the District Attorney's wiretap application and warrant as a person whose conversations were likely to be overheard. (See Appendix F.) After a hearing, the motions to suppress were denied on all grounds. Each of those grounds was preserved at trial by means of timely objections.

In addition to the motions to suppress, counsel for Orkin filed a number of other pre-trial motions in which Bowen did not join. By one of those motions, counsel for Orkin sought to quash the indictment on the ground that it had been returned by grand jurors

whose selection was governed by a process through which young adults under the age of 30 were systematically excluded from grand jury service. (See Appendix G.) At a hearing held to consider the merits of that contention, it was established that young adults aged 21 through 29, inclusive, were underrepresented by some 68% in the grand jury venire. (See the excerpts from the transcript of that hearing reprinted in Appendix G.) Nevertheless, the trial court refused to quash the indictment.

After all pre-trial motions were denied, Orkin and Bowen were jointly tried before a jury in September, 1974.

The State's case was built around the intercepted conversations between Orkin and Bowen on June 20, 1974, considered in light of Bowen's prior declarations to Landrum and Armistead. Landrum himself was put on the stand and asked to recount the discussions during which Bowen had claimed to be acting for a "friend". After Landrum, the State offered the testimony of Detective Gene Matthews (the District Attorney's chief investigator) who described the manner in which the Bowen-Armistead conversations had been monitored and recorded. Matthews then proceeded to state the substance of what he had overheard.

At the first mention of Bowen's statements implicating Orkin, counsel for Orkin objected on the ground that the use of hearsay to establish Orkin's guilt violated Orkin's Sixth Amendment right to confront and cross-examine the witnesses against him. (An excerpt from the trial transcript showing that objection is reprinted in Appendix H.) After

that objection had been overruled, the same objection was restated from time to time during Matthews' testimony whenever Matthews quoted words of Bowen implicating Orkin. Once it became clear that the Court intended to overrule the objection each time it was raised, counsel for Orkin noted a continuing objection to all such testimony on both constitutional and evidentiary grounds. (See page 450 of the trial transcript, reprinted in Appendix H.) Objections to the same effect were made during Armistead's testimony, and counsel's continuing objection to the hearsay references to Orkin was acknowledged by the Court throughout the trial. (See pages 865-866 of the trial transcript, reprinted in Appendix H.) Ultimately, the jury was permitted to learn the complete details of Bowen's various conversations through the testimony of Matthews and Armistead and through recordings of the actual conversations themselves, which were played to the jury at the end of the State's case.

In his own defense, Orkin steadfastly denied that he was responsible for Bowen's dealings with Landrum and Armistead. While Orkin confirmed that he had once given Bowen reason to believe that Johnson might cause him some difficulty, Orkin declared that he had never asked Bowen to get rid of Johnson. Without the least equivocation, Orkin testified that he had never known that Bowen was negotiating for Johnson's murder.

Relying on a defense of entrapment, Bowen elected not to take the stand. Since Bowen could not be cross-examined, counsel for Orkin were hampered in their efforts to reconcile Bowen's hearsay declara-

tions with Orkin's sworn testimony.

After their conviction, the Petitioners appealed to the Supreme Court of Georgia. That court affirmed the trial court's rulings on the motions to suppress as well as on Orkin's motion to quash the indictment. With respect to the Petitioners' claim that Orkin should have been named in the wiretap application and warrant, the court held that the issuing magistrate's determination of probable cause as to Orkin could not be reversed, since it appeared that no evidence of Orkin's complicity in a criminal conspiracy existed on June 20, 1974, apart from Bowen's unverified and unreliable declarations. The court also held that, notwithstanding Orkin's showing that young adults were substantially underrepresented in the grand jury venire, Orkin had not proved that young adults constituted a cognizable group, whose systematic exclusion would violate Orkin's Fourteenth Amendment right to a grand jury composed of a fair cross-section of the community.

Within days after their conviction had been affirmed, and after their motion for rehearing was denied, the Petitioners discovered new evidence during the deposition of Gerald Johnson in a related civil action. At that time Johnson testified that on June 20, 1974, before the surveillance warrant was obtained, he had told agents of the District Attorney's office that his wife had had an affair with Orkin and that no one but Orkin could have a reason to want him dead.

Johnson's testimony in that regard directly contradicted statements made by Detective Matthews at

the hearing on the Petitioners' motions to suppress. During that hearing Matthews had insisted that on June 20, 1974, the State had had no evidence to corroborate Bowen's claim that Orkin was his co-conspirator. Johnson's new testimony was of critical significance, since the Georgia Supreme Court had excused the failure to identify Orkin in the surveillance application and warrant only because that court had been assured by the State that Bowen's declarations had been wholly uncorroborated.

On the strength of Johnson's deposition, the Petitioners promptly filed their extraordinary motion for new trial. (See Appendix I.) In that motion they renewed their argument that the State's wiretap evidence should have been suppressed in consequence of the failure to identify Orkin as a person whose communications were likely to be overheard. In addition, the Petitioners contended that by deliberately failing to disclose the statement Johnson made on June 20, 1974, the District Attorney and his assistants had prevented the Petitioners from introducing evidence vital to their defense. As a result, it was insisted that the Petitioners had been denied due process of law. (See the excerpts from the transcript of the hearing on the extraordinary motion, reprinted in Appendix I.)

When the trial court denied their motion, the Petitioners appealed that ruling to the Court of Appeals of Georgia. That court affirmed the lower court's disposition of the case by determining that the Petitioners' newly discovered evidence was merely "cumulative" evidence which did not require a new trial to be granted. Thereafter, the Petitioners

unsuccessfully applied to the Supreme Court of Georgia to review that judgment by writ of certiorari.

REASONS FOR GRANTING THE WRIT

1. THE WRIT OF CERTIORARI SHOULD BE ISSUED SO THAT THIS COURT MIGHT DETERMINE WHETHER A KNOWING AND DELIBERATE VIOLATION OF 18 U.S.C. §2518(1)(b)(iv) WHICH PREVENTS AN ISSUING MAGISTRATE FROM REACHING AN INTELLIGENT DECISION ON THE PROPRIETY OF ELECTRONIC SURVEILLANCE WILL REQUIRE SUPPRESSION OF WIRETAP EVIDENCE.

William Orkin's conversations with Bowen were not intercepted on June 20, 1974, by accident or by extraordinary good luck. The interception of those conversations came as the direct result of a carefully designed plan whose only purpose was to overhear Orkin's response to a message which Armistead ordered Bowen to deliver.

During the months preceding June 20, 1974, the prosecution had amassed a quantity of information which made it appear that Orkin had full knowledge of Bowen's actions. Gerald Johnson himself had offered the prosecution a motive that explained why Orkin could be involved. As a result, the prosecution had every reason to believe that Orkin was Bowen's co-conspirator. Indeed, the prosecution had no reason to suspect any other person.

No wiretap was needed in order to prosecute Bowen for a felony offense. Bowen had already

damned himself by his own admissions. The only justification for the wiretap was to gather evidence that would solidify the prosecution's case against Orkin, which was based entirely upon hearsay and circumstantial evidence. At the hearing on the motion to suppress, Detective Matthews even admitted that in his wiretap affidavit, when he spoke of "a potential murder conspiracy involving BOBBY CHARLES BOWEN and others", he was actually referring to William Orkin. Moreover, since the prosecution's plan required Armistead to induce Bowen to communicate with Orkin, it was virtually certain that Orkin's statements would be monitored.

In the proceedings below the prosecution did not try to suggest that the omission of Orkin's name from the wiretap documents came as the result of oversight or inadvertence. On the contrary, the Assistant District Attorneys who were responsible for the case made it plain that they had considered including Orkin but had deliberately withheld his name. This, then, is a case which must be distinguished from *United States v. Donovan*, 429 U.S. —, 97 S. Ct. 658 (No. 75-212, decided January 18, 1977).

In that case this Court affirmed that under 18 U.S.C. §2518(1)(b)(iv), a wiretap application and warrant must specify the name of every person for whom there is probable cause to believe that a particular crime is being committed and whose conversations are likely to be intercepted. While the Court also held that a violation of that requirement will not ordinarily give cause for the suppression of evidence gathered by surveillance, the Court acknowledged that a different situation would obtain

in the case of a knowing and deliberate violation. *United States v. Donovan, supra*, 97 S. Ct. at 672 n23.

This case presents that very situation. What the prosecution wanted to do was to record a statement in Orkin's words which could later be used against him. To accomplish that, the prosecution went to the issuing magistrate with an application which identified only Bowen, but which also referred to other "unknown persons". By that stategem, the prosecution concealed the fact that it intended to eavesdrop on the conversations of a well-known businessman of sterling reputation. And despite the fact that the investigation had narrowed to a single suspect, the prosecution's reference to "unknown persons" made it appear that the case involved a multi-party conspiracy which could not be unraveled without a wiretap. By deceiving the issuing magistrate in such a fashion, the prosecution insured that the magistrate would not require further investigation before authorizing a tap on Bowen's phone.

Unlike *United States v. Donovan*, this is a case in which the "statutorily imposed preconditions to judicial authorization" were *not* satisfied. See *United States v. Donovan, supra*, 97 S. Ct. at 672. In this case, the prosecution's conduct prevented the issuing magistrate from making an informed decision concerning the propriety of electronic surveillance. Under the circumstances, what is involved here is no less than a warrantless search and seizure which was conducted in blatant and intentional disregard of statutory and constitution requirements. Because of that, this Court should issue its writ of certiorari and address the question it reserved in footnote 23 of its

opinion in *United States v. Donovan.*

2. THE COURT SHOULD ISSUE A WRIT OF CERTIORARI IN ORDER TO RESOLVE AN ISSUE OF PROSECUTORIAL MISCONDUCT.

In this case the prosecution deliberately withheld information which would have enabled the Petitioners to prove a violation of state and federal wiretap laws. That information was that on June 20, 1974, just before the surveillance warrant was obtained, Gerald Johnson met with the prosecutor in charge of this case and volunteered that Orkin had had an affair with Johnson's wife. In a further statement during that same meeting, Johnson also declared that Orkin was the only man who could have wanted him dead.

By disclosing a motive for Orkin's complicity in a murder plot, those statements made it appear that Bowen's claims about Orkin were well-founded. When added to the information already available to the District Attorney, they supplied probable cause to believe that Orkin was involved in the crime under investigation and that his conversations were likely to be overheard during the anticipated surveillance operation. As a result, Orkin should have been named in the District Attorney's wiretap application, as well as in the warrant. When that was not done, the requirements of 18 U.S.C. §§2518(1)(b)(iv) and 4(a) were violated. More importantly, the omission of Orkin's name from the electronic surveillance documents violated §26-3004(c) of the Criminal Code of Georgia.

In applying for wiretap authorization on June 20, 1974, the District Attorney had to satisfy state, as well as federal standards. The requirements of §26-3004(c) are co-extensive with those of 18 U.S.C. §2518(1)(b)(iv). Thus, the District Attorney's failure to identify Orkin must be assessed in light of §26-3007 of the Criminal Code of Georgia, the Georgia statute which corresponds to 18 U.S.C. §2518(10)(a). Since §26-3007 of the Criminal Code of Georgia is not susceptible of a restrictive interpretation in the manner of this Court's interpretation of 18 U.S.C. §2518(10)(a), the omission of Orkin's name from the District Attorney's wiretap application would have required the suppression of the conversations between Orkin and Bowen which were intercepted on the night of June 20, 1974.

Apart from the Orkin-Bowen conversations, the State had no direct evidence to show that Orkin had conspired with Bowen to bring about Gerald Johnson's murder. Thus, if those conversations had been suppressed, Bowen's hearsay references to Orkin could not have been considered in determining Orkin's guilt or innocence. Because of that, evidence that Johnson had corroborated Bowen before the wiretap warrant was issued would have been of paramount importance to the Petitioners' case. If Johnson's statements had been disclosed at trial or during the hearing on the motions to suppress, the Petitioners would not have been convicted. By preventing the Petitioners from gaining knowledge of those statements, particularly after the Petitioners had inquired about the existence of corroborative evidence during the hearing on the motions to suppress, the prosecution violated its constitutional duty

under this Court's decisions in *Brady v. Maryland*, 373 U.S. 83 (1963), and *United States v. Agurs*, 427 U.S. 97 (1976). Compare *Curry v. Estelle*, 531 F.2d 1260 (5th Cir. 1976) (evidence withheld by prosecution relating to defendant's attack on search warrant was possibly exculpatory and required a new trial).

The court below avoided the analysis outlined above by reaching the untenable conclusion that Johnson's statements were merely cumulative and, therefore, did not satisfy the requirements by which an extraordinary motion for a new trial must be judged. In basing its decision on that ground, the court erroneously treated the Petitioners' newly discovered evidence by the same standard that would have been applied if the Petitioners had merely produced an additional witness for the purpose of bolstering testimony given at the trial. Johnson's testimony would have had an important impact on a threshhold question involving the admissibility of the State's most important evidence. That question, whether Orkin should have been named in a wiretap application, demanded an assessment of probable cause — a standard which is necessarily measured in terms of cumulative evidence. Thus, the conclusion that the Petitioners' newly discovered evidence was "cumulative" to the information supplied by Bowen was a conclusion which should have formed the beginning of the lower court's inquiry, rather than its end.

The lower court should have considered whether that evidence, when added to all the other information available to the prosecution on June 20, 1974,

required a redetermination of the probable cause issue under state law. If so, then the prosecution's deliberate suppression of that evidence deprived the Petitioners of due process.

The record of this case shows deliberate misconduct by the prosecution which substantially affected the outcome of the Petitioners' trial. To remedy that misconduct, a writ of certiorari should be issued to the Court of Appeals of Georgia.

3. BY GRANTING THE WRIT IN THIS CASE, THE COURT MAY NOT ONLY REVERSE AN ERRONEOUS DECISION BUT MAY ALSO CLARIFY ISSUES OF PARAMOUNT IMPORTANCE WHICH ARE COMMONLY ENCOUNTERED IN BOTH STATE AND FEDERAL CONSPIRACY PROSECUTIONS.

A. In its decision below, the Supreme Court of Georgia misinterpreted and misapplied the decisions of this Court.

In a very real sense Bowen was the chief witness for the prosecution, even though he was not called to testify. Absent proof of Bowen's statements to Landrum and Matthews concerning Orkin's knowledge of Bowen's actions, it was possible to believe Orkin's testimony that he had never known what Bowen was undertaking to accomplish. Orkin's response to Bowen's report of Armistead's fateful message ("You're kidding.") might well have been interpreted by the jury as the shocked outcry of a man who had never intended any harm to come to Johnson. But Bowen's statements to

Landrum about his "friend" and Bowen's references to Orkin during his conversations with Armistead gave the intercepted conversations a far more sinister aspect — one which Orkin could not adequately rebut without an opportunity to cross-examine Bowen.

This was a case in which the hearsay declarations of Orkin's alleged co-conspirator were repeated to the jury throughout the Petitioners' five-day trial. His many statements implicating Orkin were quoted time and again by Landrum, Matthews, and Armistead. And when the prosecution's last witness had been dismissed, recordings of Bowen's very words were played to the jury for almost two hours.

When it came time for the defense to offer explanations for Bowen's conduct, Bowen elected not to take the stand. His refusal to offer any explanation must have made the jury all the more unwilling to accept Orkin's own account of the affair. To make matters worse, Bowen also relied upon a defense of entrapment. By doing so, Bowen necessarily admitted the existence of a conspiratorial agreement, which Orkin steadfastly denied.

The record of this case is fraught with overtones of *Pointer v. Texas*, 380 U.S. 400 (1965), *Douglas v. Alabama*, 380 U.S. 415 (1965), and *Bruton v. United States*, 391 U.S. 123 (1968). Nevertheless, the Supreme Court of Georgia gave no thought to the similarities between those cases and the case at hand. Instead, it distinguished those cases upon the facile ground that they involved confessions by an accomplice and were not concerned with the co-conspirator exception to the hearsay rule. What is more, the Georgia Supreme Court adopted the misguided notion that *Dutton v. Evans*, 400 U.S. 74 (1970), established the proposition that the co-conspirator exception is coextensive with the Confrontation Clause. Thus, in deciding Orkin's Sixth Amendment issue, the Georgia Supreme Court did no more than determine that the proper foundation for the co-conspirator exception had been laid.

If that Court had made a proper study of the issue, it would have found that the facts of this case are significantly different from those in *Dutton v. Evans*. Bowen's hearsay declarations were not merely peripheral to the prosecution's case, but were extensively relied upon in order to establish the existence of a conspiracy beyond a reasonable doubt. Bowen did not name Orkin in the course of a spontaneous outburst such as that involved in *Dutton*. Instead, he stated Orkin's name in direct response to questions posed by Armistead, after Bowen had been pressed to identify his "friend." Moreover, Bowen's statement contained inherent ambiguities which Orkin had no opportunity to expose and which the jury was in no position to evaluate.

Of all of Bowen's statements which were quoted at the trial, the one most critical to Orkin's defense was Bowen's remark to Armistead that a friend to whom Bowen was much indebted had asked Bowen to do him the favor of getting rid of Johnson. Since Orkin denied any knowledge of

Bowen's plans to murder Johnson, that incredible statement was the inevitable focus of Orkin's defense. When Bowen elected not to testify, Orkin was left without an opportunity to reconcile the conflict between his own sworn testimony and Bowen's hearsay declaration.

Since Bowen did not take the stand, the jury was given no enlightenment on the facts and circumstances which may have led Bowen to believe that he had been asked to hire a "hit man." By cross-examining Bowen, counsel for Orkin could have explored the theory that Bowen, a man of no great intellect, might have misinterpreted some offhand remark which was not seriously intended. Certainly, Bowen's statements gave no hint that Bowen's "friend" had asked his "favor" on more than one occasion. Thus, there remained the possibility that Bowen's conduct on May 13, 1974, and in the weeks that followed may have stemmed from an intemperate comment to which Bowen had attached an entirely inappropriate meaning.

Bowen was the only person with knowledge of the facts which had impelled him to seek out a murderer for Gerald Johnson. His unavailability foreclosed Orkin's opportunity to develop those facts in a way that would have materially benefited Orkin's defense by bolstering the credibility of Orkin's testimony. Orkin's predicament was, therefore, quite unlike that of the defendant in *Dutton v. Evans*. In the latter case, the testimony of an eye-witness and accomplice made it unlikely that cross-examination of the co-conspirator declarant would have cast doubt on the declarant's

ability to perceive whether the defendant had actually been involved in the murder in question.

On the record of this case, there was every reason for the Petitioners to be granted a new trial. The failure of the lower court to do so should be corrected by this Court.

B. THERE IS A NEED FOR CLARIFICATION OF THE CIRCUMSTANCES IN WHICH THE USE OF CO-CONSPIRATOR HEARSAY FOR SUBSTANTIVE PURPOSES VIOLATES THE SIXTH AMENDMENT RIGHT OF CONFRONTATION.

Dutton v. Evans, 400 U.S. 74 (1970), is the only decision of this Court in which the conflict between the Confrontation Clause and the co-conspirator exception to the hearsay rule has been addressed. In that decision, it was held that under the particular facts and circumstances of that case the substantive use of a hearsay declaration made after the object of the conspiracy had been attained did not require the defendant's conviction to be set aside.

While five members of this Court joined in that ultimate conclusion, the Court was unable to issue a majority opinion. Instead, the opinion of the Court was endorsed by only four justices, with Justice Harlan expressing a distinctly different line of reasoning. As a result, no clear guidelines were established by which to assess the merits of other cases in which the prosecution's desire to produce all relevant evidence and the defendant's right of cross-examination inevitably collide. Al-

though the plurality opinion written by Justice Stewart does suggest certain factors for consideration on that matter, the relative importance of those factors and the possibility that one or more of those factors, without the others, might determine the outcome of a given case have not yet been clarified. A need for clarification has been recognized not only by commentators but by representatives of the Department of Justice as well. See *United States v. Puco*, 476 F.2d 1099, 1106-1108 (2nd. Cir. 1973); Davenport, *The Confrontation Clause and the Co-Conspirator Exception In Criminal Prosecutions: A Functional Analysis*, 85 Harv. L. Rev. 1378, 1381 (1972); and Note, *Right of Confrontation: Admissibility of Declaration by Co-Conspirator*, 85 Harv. L. Rev. 188, 197-199 (1971).

Now that seven years have passed since *Dutton v. Evans* was decided, the time has come for this Court to revisit the principles which underlay its holding in that case and to express those principles in greater detail. It also remains for this Court to consider aspects of the co-conspirator exception which have not yet been examined by this Court in the context of a Sixth Amendment challenge. Given the important role conspiracy prosecutions have assumed in the modern scheme of state and federal law enforcement, this Court's resolution of the issues which this case presents will have an enormous impact on a substantial number of criminal trials.

C. By issuing the writ this Court could resolve Sixth Amendment issues which were left open by Dutton v. Evans.

The hearsay statement which this Court considered in *Dutton v. Evans* was one that had been made after the operative phase of the conspiracy had ended and at a time when the declarant had already been arraigned on a charge of murder. That statement, while admissible under the co-conspirator exception which has evolved in Georgia courts, could not have been admitted in a federal prosecution because it was not made in furtherance of the conspiracy. Consequently, the validity of the co-conspirator exception applied in federal courts and in a great number of state jurisdictions was neither challenged nor examined in *Dutton v. Evans*. See 400 U.S. 74, 80-81.

This case, however, involves a series of declarations which were made while the alleged conspiracy was still in progress. Upon granting certiorari the Court would have an oportunity to resolve the question it reserved in *Dutton v. Evans*. By doing so, the Court could reconcile a conflict concerning whether statements admissible under the federal rule, by that fact alone, are immune from any Sixth Amendment challenge. See e.g., *Ottomano v. United States*, 468 F.2d 269 (1st Cir. 1972), cert. denied 409 U.S. 1128 (1973) (federal co-conspirator rule does not violate Confrontation Clause); *United States v. Weber*, 437 F.2d 327 (3d Cir. 1970), cert. denied 402 U.S. 932 (1971) (federal co-conspirator rule does not violate Confrontation Clause); *United States v. Puco*, 476 F.2d 1099

(1973) (use of co-conspirator hearsay will not necessarily be constitutional simply because of its admissibility under federal rule; *United States v. Adams*, 446 F.2d 681 (9th Cir. 1971); *United States v. Menichino*, 497 F.2d 935 (5th Cir. 1974) (declining to endorse either view); *State v. Speerschneider*, 25 Ariz. App. 340, 543 P.2d 461, 465-467 (Ariz. Ct. of App. 1975) (Sixth Amendment must be considered even with respect to evidence admissible under federal rule).

At the same time the Court could clarify the notion of availability as a factor to be considered in weighing the merits of a confrontation issue. In decisions such as *Pointer v. Texas*, 380 U.S. 400 (1965), *Barber v. Page*, 390 U.S. 719 (1968), and *Mancusi v. Stubbs*, 408 U.S. 204 (1972), it has been held that hearsay cannot be admitted for substantive purposes in a criminal trial unless it has first been shown that an effort has been made to produce the declarant, but that the declarant is unavailable for reasons beyond the control of the prosecution. Each of those decisions, however, dealt with a situation in which the declarant was no longer physically present within the trial court's jurisdiction. None of those decisions involved a conspiracy trial with multiple defendants. As a result, the Court has not yet considered whether the prosecution's Sixth Amendment burden can be satisfied where the declarant's unavailability is a product of his insistence on his right against self-incrimination.

The possibility that a defendant's right of confrontation may be violated when, during a joint

trial, his co-defendant chooses not to be examined concerning the truth of his hearsay declarations was implied by this Court's decision in *Douglas v. Alabama*, 380 U.S. 415 (1965) (convicted co-defendant's confession read aloud by Solicitor, ostensibly for impeachment purposes). The facts of this case would require a decision of that issue. Given the recent proliferation of multi-defendant conspiracy prosecutions, in which the admission of co-conspirator declarations has become a matter of routine, the resolution of that issue would affect the rights of a substantial class of defendants, not merely the Petitioners who are now before the Court.

D. THIS CASE PRESENTS THE CONFLICT BETWEEN THE CONFRONTATION CLAUSE AND THE CO-CONSPIRATOR EXCEPTION IN THE CLEAREST POSSIBLE FOCUS BY JOINING TOGETHER IN A SINGLE CONTEXT ALL OF THE FACTORS THIS COURT HAS REGARDED AS SIGNIFICANT IN ITS DECISIONS ON THE RIGHT OF CONFRONTATION.

As the plurality opinion in *Dutton v. Evans* carefully pointed out, that case lacked a number of factors which were present in this Court's prior decisions on the Confrontation Clause. This case, however, combines all of those various factors in the setting of a conspiracy prosecution. Moreover, unlike *Dutton v. Eaves*, it involves hearsay evidence which was critical to the outcome of the case.

In *Pointer v. Texas*, 380 U.S. 400 (1965), *Bar-*

ber v. Page, 390 U.S. 719 (1968), and *Mancusi v. Stubbs*, 408 U.S. 204 (1972), hearsay declarations were introduced in the form of written transcripts of prior testimony. While actual written transcripts were not employed in the case at hand, the manner in which the prosecution introduced evidence of Bowen's statements cannot be distinguished in any practical respect from the use of written transcripts. Detective Matthews and Investigator Armistead continually "refreshed their memories" from transcripts of Bowen's recorded conversations. Moreover, the tape recordings of those conversations were actually played to the jury as the last segment of the prosecution's case. The playing of those recordings was no less prejudicial than the reading of the transcripts in the cases cited above.

In addition, like the defendant in *Bruton v. United States*, 391 U.S. 123 (1968), Orkin was subjected to substantial prejudice by the introduction at a joint trial of the hearsay statements of his co-defendant, who did not take the stand. And like the defendant in *Douglas v. Alabama*, 380 U.S. 415 (1965), Orkin was prevented from cross-examining his co-defendant with respect to uncorroborated hearsay statements which were used to show that Orkin played the leading role in a criminal venture.

Given the need for clarification of the principles underlying *Dutton v. Evans*, and given the need to resolve the questions which were left open by that decision, the presence of the factors just discussed makes this case ideally suited for the

accomplishment of those ends. Because Bowen's statements clearly implicated Orkin, and because Orkin had no opportunity to clarify the ambiguities implicit in those statements, the prejudice to Orkin by the introduction of those statements could not have been more grave. On the other hand, if Orkin's objections to the evidence of those statements had been sustained, the prosecution could not have proven its case beyond a reasonable doubt. The friction between the competing needs of the defense and the prosecution is therefore presented in this case in the clearest possible light. As a result, this is an appropriate case for further development of the meaning and significance of the Confrontation Clause.

4. BY ISSUING THE WRIT IN THIS CASE THE COURT COULD REVERSE A DECISION IN CONFLICT WITH THE PRINCIPLES ESTABLISHED BY THIS COURT AND DETERMINE AN ISSUE OF GRAND JURY DISCRIMINATION WHICH THIS COURT HAS NOT YET CONSIDERED.

In case after case this Court has held that where a State employs a grand jury system for initiating felony prosecutions, the persons selected for grand jury service must be representative of a fair cross-section of the community. See e.g., *Castaneda v. Partida*, — U.S. —, 97 S.Ct. 1272 (No. 75-1552, decided March 23, 1977); *Taylor v. Louisiana*, 419 U.S. 522 (1975). Where a defendant demonstrates that an identifiable segment of the community was substantially underrepresented in the venire from

which the grand jurors in his case were chosen, it falls upon the State to show that the underrepresentation could not have resulted from intentional discrimination. See e.g., *Castaneda v. Partida, supra; Alexander v. Louisiana*, 405 U.S. 625 (1972). If the State's rebuttal evidence is insufficient for that purpose, the defendant's indictment must be quashed.

The principles set forth above have been applied by this Court in cases involving evidence of discrimination on grounds of race, income, and sex. The case at hand would require the Court to determine whether those principles should also be applied where statistical evidence establishes a substantial underrepresentation of persons falling within certain age groups.

The Petitioners were indicted by a Georgia grand jury whose members had been selected by the process set forth in Georgia Code of 1933 §59-106, as amended. As the first stage of that process, questionnaires were mailed to all registered voters of the county where the Petitioners were indicted. In completing those questionnaires, the persons who received them were required to state their age. Once the questionnaires were returned, the jury commissioners then examined the contents of each questionnaire, thereby learning the age of every potential grand juror. As a result of their examination, the jury commissioners eliminated all persons who were not regarded as "the most experienced, intelligent and upright." Ga. Code of 1933 §59-201, as amended. When the names of all such persons had been stricken, the names on the remaining questionnaires were listed by computer. Thereafter, individual printed

slips were prepared for each name shown on the computer list. Those slips were then stored in the "grand jury box", from which the names of the Petitioners' grand jurors were ultimately chosen.

In a pre-trial motion to quash, Petitioner Orkin contended that the process outlined above had resulted in the systematic exclusion of young adults under the age of 30. At a hearing held to consider that motion, counsel for Orkin demonstrated that while the members of that age group comprised approximately 26% of the eligible grand jurors in Atlanta, that group comprised less than 9% of the persons whose names appeared in the grand jury box. Young adults were therefore underrepresented in the grand jury venire by some 68%.

Despite that showing, the trial court overruled Orkin's motion. On appeal, that ruling was affirmed on the ground that Orkin had failed to prove that young adults under the age of 30 constituted a "cognizable group" entitled to representation under Fourteenth Amendment standards.

The Petitioners contend that the holding of the Supreme Court of Georgia in that regard conflicts with the principles of this Court's decision in *Taylor v. Louisiana, supra.* In that case it was held that a state may not systematically exclude women from service on its grand juries. Since women as a group are no more cohesive in their moral, political, and social attitudes than young adults, it follows that in determining whether a particular selection process has achieved a fair cross-section of the community, age is no less a factor to be considered than sex.

Orkin's motion to quash was predicated solely on a claim of age discrimination. The record of this case therefore presents that issue in its purest form, unaffected by claims of discrimination on alternative grounds. Since that is so, the case at hand would afford this Court a perfect opportunity to resolve an issue much litigated in the lower courts, but which this Court has not yet examined.

CONCLUSION

For the reasons expressed above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals of Georgia.

Respectfully submitted,

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September 6, 1977

CERTIFICATE OF SERVICE

I hereby certify that I have made service of the foregoing Petition by depositing a copy of same in the United States Mail with sufficient postage affixed thereto, addressed to Respondent's attorney as follows:

Mr. Lewis R. Slaton
District Attorney of Fulton County
Fulton County Courthouse
Atlanta, Georgia 30303

This 2 day of Sept, 1977.

HUGH M. DORSEY, JR.
Attorney for Petitioner Orkin

APPENDICES

APPENDIX A

ORKIN et al. v. THE STATE
236 Ga. 176
(Georgia Supreme Court, 1976) 1/27/76

HILL, Justice.

Defendants William B. Orkin and Bobby Charles Bowen appeal from a verdict of guilty of the crime of "conspiracy to commit murder" and jury sentences of five years imprisonment as to each defendant. The main issues on appeal involve the crime of conspiracy (Division 1) and the admission of certain electronic recordings into evidence (Divisions 2 and 3). Also in issue are the trial court's rulings on various motions and objections made by the defendants prior to and during trial, as well as the charge of the court. This conspiracy allegedly occurred in the summer of 1974. Other facts will be stated as they become necessary for consideration of the 27 enumerated errors.

• • •

2. Defendants' Enumerations 4, 11 and 12 cite as error the overruling of motions to suppress evidence obtained by electronic surveillance. The motions to suppress were based on the defendants' contentions that (a) Georgia law does not authorize an investigation warrant to issue for the offense of conspiracy; (b) illegally obtained evidence formed the basis of probable cause upon which the investigation warrant was issued; (c) the order authorizing electronic surveillance of defendant Bowen failed to specify

a particular description of the type of communication sought to be intercepted; and (d) the order was insufficient on its face because it failed to include the name of defendant Orkin as a known party.

* * *

(b) Defendants next contend that the investigation warrant was issued on a finding of probable cause based on illegally obtained evidence and that the warrant was therefore illegal.

Testimony at the hearing on the motions to suppress evidence reveals that defendant Bowen approached Detective C. E. Landrum of the Atlanta Police Department, a friend of Bowen's, on May 13, 1974, with an offer to pay $5,000 or more in cash if Landrum would kill an unnamed person who was "giving some trouble" to an "old friend" of Bowen's, or $1,000 if Landrum would help Bowen contact a hired killer. Bowen called Landrum several times in the next few days in order to persuade him to assist in securing a killer. Landrum pretended to go along, but went to the district attorney's office to get advice on what action to take to avert the intended crime.

A meeting was first arranged by Landrum between Bowen and a so-called "hit man" who told Bowen that he would not do it himself but that he had an out-of-town friend who would. Bowen voluntarily offered this man $2,500, which he refused.

Arrangements were then made in phone conversations between Bowen and Landrum for Bowen to meet the second "hit man" at an airport motel upon

the transmission of a prearranged signal. It was agreed that Landrum would convey the signal and Bowen's number to the "hit man" and then cease to act as a middle man. Landrum recorded these telephone conversations with a cassette attached to his own phone, without having obtained an investigation warrant.

Mr. Rex Armistead, an investigator for the Mississippi Attorney General's office, was enlisted to pose as the hired killer. Armistead contacted Bowen by telephone on June 18, 1974, utilizing the prearranged code, and a meeting was arranged. Bowen met Armistead at an Atlanta motel that night and the contract to kill Gerald Johnson was discussed. Bowen gave Armistead details of the intended victim's daily routine, advised Armistead that he wished the killing to look like a mugging, and gave Armistead $5,000. At a second meeting on June 19, Bowen paid an additional $2,500 to Armistead and gave him a sawed-off shotgun and four live shells. During these meetings, Bowen alluded to the fact that he was acting for another and mentioned the name Orkin several times. Armistead thereafter referred to Orkin in his dealings with Bowen. The last conversation between Bowen and Armistead occurred by telephone on June 20. These four conversations, two by telephone and two in person, were recorded with Armistead's permission. None of these recordings was authorized by an investigation warrant.

On the afternoon of June 20, a written application, under oath, was made by the district attorney setting forth the facts discovered from the taped conversations as constituting probable cause to issue a wire-

tap order, and the order was signed by a judge of Fulton Superior Court. Defendants contend that the recorded conversations between Bowen and Landrum and Bowen and Armistead were illegally obtained and, therefore, cannot be a valid basis for finding probable cause to issue the warrant.

In each case Bowen voluntarily engaged in communications with persons who were parties to the conversations and who gave their permission to have the conversations recorded. Both the federal and the Georgia statutes have provisions authorizing electronic surveillance in certain situations when one party to the communication consents.

The federal law, 18 USCA § 2511(2)(c), provides: "It shall not be unlawful . . . for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception."

Code § 26-3006 provides: "Nothing in section 26-3001 shall prohibit the interception, recording and divulging of a message sent by telephone, telegraph, letter or any other means of communication . . . in those instances wherein the message shall be initiated or instigated by a person and the message shall constitute the commission of a crime or is directly in the furtherance of a crime, provided at least one party thereto shall ocnsent."

It should be kept in mind that some of the taped conversations with Bowen were the result of wiretaps and others resulted from his meetings with

Armistead, which Armistead consented to have recorded. The one party consent provision of Code § 26-3006 is applicable to face-to-face oral communications. *Humphrey v. State*, 231 Ga. 855, 862 (204 SE2d 603) (1974), cert. den. 419 U.S. 839 (1975).

Defendants rely on *Farmer v. State*, 228 Ga. 225 (184 SE2d 647) (1971), and urge that, according to *Farmer*, although the tapping of a criminal telephone conversation where one party consents is not illegal under state law, it nevertheless violates the Fourth Amendment and hence is inadmissible as evidence. *Farmer* followed Katz v. United States, 389 U. S. 347 (88 SC 507, 19 LE2d 576) (1967).

In Katz, supra, federal agents attached an electronic listening and recording device to the outside of a public telephone booth and recorded petitioner's part of his conversation. The court said: "The Government's activities in electronically listening to and recording petitioner's words violated the privacy upon which he justifiably relied in using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment." 389 U. S. 353. The court went on to say that a warrant would be required for such surveillance. The Omnibus Crime Control and Safe Streets Act of 1968, with its exception of consent (18 USCA § 2511(2)(c), supra), was enacted after the decision in Katz.

In United States v. White, 401 U. S. 745 (91 SC 1122, 28 LE2d 453) (1971), the Supreme Court upheld the use of evidence obtained by government agents transmitted to them by a concealed radio car-

ried by an informer during meetings with the defendant. There the court distinguished Katz on the ground that although Katz was justified in his expectations of privacy, White was not justified in confiding in an informer. The court held that since the informer could testify as to what White had said, the more reliable recordings of those conversations were admissible. The court went on to note that its opinion was shared by Congress as shown by passage of the Omnibus Crime Control and Safe Streets Act of 1968 and the ABA Standards for Criminal Justice, Electronic Surveillance § 4.1 (which section approves the use of electronic surveillance techniques by law enforcement officers for overhearing or recording wire or oral communications with the consent of one of the parties).

We believe that the possible scope of Katz, supra, was limited by White.[2] Thus, when Bowen spoke by phone with Landrum and with Armistead he was not justified in his expectations of privacy. The recordings of those conversations were not obtained illegally and were admissible into evidence. Whether the conversation be face-to-face, or via telephone, Bowen's expectations of privacy were the same. Bowen has no Fourth Amendment right to silence Landrum and Armistead or to exclude recordings of conversations he had with them and which they could relate in their testimony.

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[2] Because United States v. White, supra, is more recent than Katz v. United States, and because a state is without authority to impose federal constitutional restrictions on police activity when the United States Supreme Court refrains from imposing them, Oregon v. Hass, 43 LW 4417, 4418 (1975) we find that our decision in *Farmer v. State*, supra, is now controlled by White rather than Katz.

Thus under both federal and state law, the recordings of the conversations Bowen had with Landrum and Armistead were lawfully obtained. Those recordings therefore validly supported a finding of probable cause to issue the investigation warrant and were admissible in evidence at the trial of this case.

* * *

(d) The defendants' final contention regarding the wiretap is the failure of the warrant to include the name of William Orkin as a known party to the conspiracy. The application and order authorized surveillance of Bowen and "other unknown persons." The defendants argue that this language failed to comply with the requirements of 18 USCA §§ 2518 (1)(b)(iv) and 2518(4)(a), in that Orkin was a known conspirator within the meaning of those provisions.

Those sections require, in pertinent part, that the application (18 USCA § 2518(1)(b)(iv)) and order (18 USCA § 2518(4)(a)) shall contain "the identity of the person, if known," committing the offense and whose communications are to be intercepted. These provisions have been interpreted by the United States Supreme Court and the Courts of Appeals of various circuits to mean that a person must be named in an application and order authorizing electronic surveillance where there is probable cause to believe that that person has committed or is committing the offense to be investigated and would be using the telephone to be monitored. United States v. Kahn, 415 U.S. 143, 155 (94 SC 977, 39 LE2d 225)

(1974); United States v. Martinez, 498 F2d 464 (8) (6th Cir. 1974); United States v. Bernstein, 509 F2d 996 (4th Cir. 1975); United States v. Donovan, 513 F2d 337 (6th Cir. 1975); United States v. Moore, 513 F2d 485 (D. C. Cir. 1975). This probable cause standard does not require that the government attempt to discover whether probable cause might exist to name an individual. Kahn, supra. Where probable cause does exist to believe that a person is both involved in the illegal activity and likely to use the monitored facility, he must be named in the application and order for the evidence obtained to be used against him. Bernstein, supra; Moore, supra.

The responsibility for determining whether probable cause exists to name an individual as a known party in a surveillance warrant rests upon the judge issuing the order. 18 USCA § 2518 (3). As in the determination of probable cause in other situations, the exercise of the judge's discretion will receive great deference from the reviewing courts. Spinelli v. United States, 393 U. S. 410, 419 (89 SC 584, 21 LE2d 637) (1969); United States v. Melancon, 462 F2d 82 (5) (5th Cir. 1972).

Testimony at the hearing on the motion to suppress shows that information as to Orkin's possible involvement was submitted to the district attorney, and that the court heard sworn testimony concerning this information at the time the application was presented. Where the judge is fully advised in sworn testimony of the identity of a person not named in an application but whose complicity is suspected, the prosecuting attorney has fulfilled the requirements of 18 USCA § 2518(1)(b)(iv). See Moore, supra, p.

496, n. 31. Thus, in the case before us, unlike the cited cases, the district attorney presented the evidence to the court and the court made the probable cause determination as to Orkin being a known conspirator. That determination is entitled to deference upon review.

The defendants contend that Orkin was a known person by citing the fact that Orkin's name was mentioned as being connected with the conspiracy during several conversations between Bowen and Armistead prior to the application for the wiretap order. The judge had knowledge of these facts. Orkin was never implicated by anyone other than Bowen himself. In United States v. Bernstein, supra, informants proven to be reliable implicated Bernstein, who was reputedly involved in gambling. Bowen's reliability was unproven and he was making serious allegations of unusual criminal activity against a man of good reputation in the community. Although Bowen admittedly was a participant in the conspiracy, and thus was not an informant in the usual sense, still his statements to Armistead regarding Orkin were unverified. Defendants urge that if the officers could not rely on Bowen's statements involving Orkin, then they could not rely on Bowen's statements regarding the proposed murder, and thus there was no probable cause to believe Bowen was engaged in activity which would support the issuance of the investigation warrant. They contend that the state cannot rely on Bowen's statements implicating himself as showing probable cause for the issuance of the warrant and at the same time reject Bowen's statements implicating Orkin as showing probable cause that Orkin was a known conspirator. This

argument overlooks the fundamental difference between a self-incriminating statement and a statement incriminating a third person; the former is more reliable than the latter.

Defendants also point to the fact that Bowen was known to be employed by Orkin and to reside on Orkin's property. However, Bowen's reliability as to whether probable cause existed as to Orkin is not to be determined by the employer-employee relationship. Although the officers had reason to suspect Orkin, we cannot say that the trial judge erred in finding that Bowen's unverified allegations were insufficient to establish probable cause as to Orkin. In reaching this conclusion we have asked ourselves this question: Would the evidence presented to the trial judge have authorized a tap on Orkin's telephone? In view of the closeness of that question, we find that the judge issuing the order did not err in his determination that Orkin was not a known conspirator within the meaning of § 2518(1)(b) and (4)(a).

We find these enumerations to be without merit.

* * *

4. In Enumeration 9 Orkin appeals the overruling of his motion to quash the indictment on the grounds that (a) the grand jury was illegally impaneled due to the systematic exclusion of citizens of Fulton County between the ages of 18 and 21; (b) the Act providing for selection of the grand jury (Code Ann. § 59-201) is unconstitutional because of the exclusion of citizens between the ages of 18 and 21; (c) the indictment was illegal due to the systematic exclusion of young adults under the age of 30, resulting

in a disparity of 4 to 1 between the number of adults 18 to 30 in the grand jury pool and in the community at large; and (d) the statutes affording to public officials the right to appear before the grand jury prior to the return of an indictment against them, Code Ann. §§ 40-1617 and 89-9908, violate his right to the equal protection of the laws and thus render the indictment void.

The 14th and 6th Amendments to the U. S. Constitution require that a state not deliberately and systematically exclude an identifiable and distinct group from jury lists, as an accused is entitled to a jury drawn from a fair and representative cross-section of the community. Taylor v. Louisiana, 419 U. S. 522 (95 SC 692, 42 LE2d 690) (1975); Peters v. Kiff, 407 U.S. 493 (92 SC 2163, 33 LE2d 83) (1972); Alexander v. Louisiana, 405 U. S. 625, 628 (92 SC 1221, 31 LE2d 536) (1972); Swain v. Alabama, 380 U. S. 202, 208 (85 SC 824, 13 LE2d 759) (1965); Hernandez v. Texas, 347 U. S. 475, 478 (74 SC 667, 98 LE2d 866) (1954). The states are free to prescribe relevant qualifications for jurors within this basic requirement. Taylor, supra, 701.

The burden is upon the defendant challenging the array of a jury to establish a prima facie case that there has been systematic exclusion of a distinct class of citizens. Whitus v. Georgia, 385 U. S. 545, 550 (87 SC 643, 17 LE2d 599) (1967). In order to show systematic exclusion, the defendant must demonstrate sufficiently to establish a prima facie case that (1) the sources from which the jury list was drawn are tainted in that they provide the opportunity for discrimination, and (2) that use of these sources re-

sulted in a substantial disparity between the percentages of the separate class on the jury list and in the population as a whole. Whitus, supra; Foster v. Sparks, 506 F2d 805 (4) (5th Cir. 1975); *Pass v. Caldwell*, 231 Ga. 192 (200 SE2d 720) (1973). Implicit in these requirements is that the defendant has the burden of showing that the group he seeks to prove has been systematically excluded constitutes a distinct and separate class of citizens. Hernandez, supra, p. 478; *State v. Gould*, 233 Ga. 844 (2) (209 SE2d 312) (1974).

Code Ann. § 59-106 provides that the jury commissioners shall select as grand jurors the "most experienced, intelligent, and upright citizens." The statute was upheld in Turner v. Fouche, 396 U. S. 346 (90 SC 532, 24 LE2d 567) (1970), as not being violative of the U. S. Constitution. Code Ann. § 59-201 provides that grand jurors shall be 21 years of age. That is not an invalid qualification in light of the requirement that grand jurors be experienced. The Age of Majority Act had no effect on the legitimacy of this requirement. *Estes v. State*, 232 Ga. 703 (2) (208 SE2d 806) (1974); *State v. Gould*, supra, p. 845. Grounds (a) and (b) of the motion to quash are without merit.

This court has previously overruled a challenge to the constitutionality of this method of jury selection against a charge of exclusion of young adults from 18 to 30. *White v. State*, 230 Ga. 327 (1) (196 SE2d 849) (1973). The defendants have failed to show that the age group 18 to 30 constitutes a significantly identifiable separate group subject to discrimination and systematic exclusion. Hernandez, supra, p. 478; *Gould*, supra, p. 845. Ground (c) of the motion is without merit.

• • •

7. Enumerations 26 and 27 appeal the admission into evidence over objection of the testimony of Matthews and Armistead concerning Bowen's declarations implicating Orkin. The defendants contend that this was a denial of Orkin's right to confrontation and cross examination as guaranteed by the 6th Amendment to the United States Constitution.

The United States Supreme Court cases cited by the defendants all deal with the situation where the confession of a co-defendant implicating the defendant was admitted as evidence in the trial of the implicated defendant. Douglas v. Alabama, 380 U. S. 415 (85 SC 1074, 13 LE2d 934) (1965); Barber v. Page, 390 U. S. 719 (88 SC 1318, 20 LE2d 255) (1968); Bruton v. United States, 391 U. S. 123 (88 SC 1620, 20 LE2d 476) (1968); Roberts v. Russell, 392 U. S. 293 (88 SC 1921, 20 LE2d 1100) (1968). In those cases, the defendant making the confession did not testify. It was thus a denial of the joint defendant's right of cross examination of witnesses to allow admission of those confessions.

None of those cases apply to the situation here, where the evidence sought to be excluded was testimony by investigating officers as to the statements made to them by a conspirator in furtherance of the conspiracy, and where there is independent evidence both as to the existence of a conspiracy and the involvement of the defendant therein. The testimony

objected to was testimony by Armistead as to statements made by Bowen in furtherance of the conspiracy, not as a confession, and testimony by Matthews as to the content of the tapes of Bowen's intercepted conversations. This testimony fits squarely into Code Ann. § 38-306, which provides that, after a conspiracy is proved, the declarations of any conspirator during the pendency of the criminal project are admissible against all. Dutton v. Evans, 400 U. S. 74, supra; *Lindsey v. State*, 227 Ga. 48, supra. We therefore find Enumerations 26 and 27 to be without merit.

* * *

Judgment affirmed. All the Justices concur, except Nichols, C. J., and Ingram, J., who dissent from the ruling on Enumeration No. 25 only and from the judgment.

ARGUED SEPTEMBER 4, 1975 — DECIDED JANUARY 27, 1976 — REHEARING DENIED FEBRUARY 11, 1976.

Conspiracy to commit murder; constitutional question. Fulton Superior Court. Before Judge Williams.

Durwood T. Pye, D. Thomas Pye, III, Lewis M. Groover, Jr., Charlie Parker, Jr., Charles L. Weltner, Wesley R. Asinof, for appellants.

Lewis R. Slaton, District Attorney, Carter Goode, Assistant District Attorney, Arthur K. Bolton, Attorney General, for appellee.

APPENDIX B

ORKIN et al. v. THE STATE
140 Ga. 651
(Court of Appeals of Georgia, 1977)

DEEN, Presiding Judge.

1. This appeal stems from the denial of an extraordinary motion for new trial in the case reported in *Orkin v. State*, 236 Ga. 176 (223 SE2d 61) wherein the conviction of William B. Orkin and Bobby Charles Bowen of conspiracy to murder Gerald Johnson was affirmed. The facts of the case as there set out will not be repeated. The second division of that opinion affirms the denial of motions to suppress evidence obtained by electronic surveillance based on evidence then available. The present appeal enumerates three additional pieces of evidence obtained after the conclusion of the trial, by means of a deposition given by Gerald Johnson in a pending related civil case. Appellants contend that had this testimony been available at the time of the hearing on the motion to suppress, a judgment excluding the tapes from evidence would have been demanded, and that without the evidence contained in the taped conversations a verdict against the defendants would not be legally sustainable. We have considered the additional evidence turned up by the deposition, and, assuming that the attorneys for the appellants showed due diligence and that all other criteria necessary to an extraordinary motion for new trial were met, we find no reversible error.

(a) Briefly, in the original case, the warrant authorizing the wiretap of Bowen's telephone was attacked as failing to include the name of William Orkin as a known party to the conspiracy. The Supreme Court stated in Division 2 (d) of its opinion, supra, p. 186: "Where probable cause does exist to believe that a person is both involved in the illegal activity and likely to use the monitored facility, he must be named in the application and order [authorizing the wiretap] for the evidence obtained to be used against him." The district attorney and the judge were aware that Bowen had stated he was hiring a killer at the request of Orkin, and that he thought Orkin wanted Johnson killed because Johnson had discovered the personal interest which Orkin had in Johnson's wife. The Supreme Court held that knowledge of this fact did not void the warrant which named Bowen and "other persons unknown." The new evidence is that after knowledge of Bowen's statement and before the application for the warrant Johnson was himself interviewed and admitted knowledge that his wife had been having a relationship with Orkin. While this is a higher type of evidence, perhaps, as to Mrs. Johnson's or Orkin's behavior with each other, it gives no more probable cause for believing that Orkin was in fact a coconspirator in the murder plans than does Bowen's own statement to that effect. Probable cause, in this context, is "the existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of [the] crime." *Dixon v. S. S. Kresge, Inc.*, 119 Ga. App. 776, 779 (169 SE2d 189) and cit. This information is no more than cumulative as to the existence

of a *motive*, not the fact. Johnson had no information at all that anyone was attempting his life. Accordingly, this cumulative evidence relating to motive does not change the original holding of the trial court, as affirmed.

(b) In the original motion to suppress it was contended that the tapes of telephone conversations between Orkin and Bowen (state's exhibit 13) should be suppressed because of a violation of Code § 26-3004 (k), providing that any publication of material so obtained "other than that necessary and essential to the preparation of and actual prosecution for the crime" is such an unlawful invasion of privacy as to require its exclusion from evidence. The third division of *Orkin v. State*, supra, holds that evidence, that these tapes were played to the Johnsons on September 18, for purposes of voice identification, did not taint the evidence. The question is what is reasonably necessary and essential to the preparation of the case for trial, and this is a fact question resting in the first instance in the controlled discretion of the district attorney, subject to review by the trial court. The "newly discovered evidence" which we deal with here is that the Johnsons also heard the tapes or possibly the conversations themselves on June 20, 1974. At that time, of course, the district attorney was in the very process of obtaining and attempting to verify the information on which the indictment would be drawn and the trial strategy formulated. The Supreme Court has already held that allowing the Johnsons to hear the tapes on September 20 did not nullify their evidentiary value, and we find no additional reason to believe that their hearing this evidence on June 20 had any different

effect.

(c) Lastly, at the request of the Johnsons, their attorney was present with them during at least a part of the time the tapes were played in September, a fact not divulged until the taking of the deposition. We would be loath to hold that the intended victim and possible special prosecutor of a crime directed against himself is not, in giving aid to the law enforcement officers, himself entitled to have the benefit of counsel. One appearing as counsel for another appears as his special agent and alter ego, and except where otherwise excluded by statute his entitlement to be present is controlled only by the entitlement of his client. It follows that none of the three facts divulged by the depositions is sufficient, by itself or in conjunction with the others, to demand a ruling on the motion to suppress contrary to that made by the Supreme Court in this case.

2. In view of the above holding it is not necessary to consider the state's cross appeal.

Judgement affirmed in Case no. 52725. Case no. 52726 dismissed. Stolz, Webb, Marshall and McMurray JJ., concur. Bell, C. J., Quillian, P. J., Clark and Smith, JJ., dissent.

ARGUED SEPTEMBER 15, 1976 —
DECIDED NOVEMBER 17, 1976 — CASE NO. 52725
REHEARING DENIED DECEMBER 3, 1976 —
CERT. APPLIED FOR

Conspiracy to commit murder. Fulton Superior Court. Before Judge Williams.

Charles L. Weltner, Wesley R. Asinof, Hansell, Post, Brandon & Dorsey, Allen Post, Hugh M. Dorsey, Jr., for appellant.

Lewis R. Slaton, District Attorney, Joseph. J. Drolet, William M. Weller, Carter Goode, Assistant District Attorneys, for appellee.

QUILLIAN, Judge dissenting.

I respectfully dissent from Division 1 (c) of the majority opinion.

1. In Division 1 (c), it was held that the presence of counsel with a state witness during the playing of an intercepted communication by the state was not "sufficient, by itself or in conjunction with the others [facts], to demand a ruling on the motion to suppress contrary to that made by the Supreme Court in this case."

To me the statute as to publication of any information obtained under the warrant is clear and unambigious. Code Ann. § 26-3004 (k) (Ga. L. 1968, pp. 1249, 1328; 1972, p. 615; 1972, pp. 952, 953) states: "*Any publication* of the information or evidence obtained under a warrant issued hereunder *other than that necessary and essential to the preparation of and actual prosecution* for the crime specified in the warrant shall be an unlawful invasion of privacy under this Chapter, and *shall cause such evidence* and information *to be inadmissible* in any criminal prosecution." (Emphasis supplied.)

Prior to the trial the state called in Mr. and Mrs.

Johnson to listen to the intercepted communication—as they stated, to attempt to identify the voice of Mr. Orkin. I see nothing wrong with this. It was for a purpose that was "necessary and essential to the preparation of" this case. However, they brought with them an attorney, Mr. O'Brien. The majority finds no fault with their attorney being present as "[o]ne appearing as counsel for another appears as his special agent and alter ego." Mr. Johnson testified that Mr. O'Brien had "been more or less a lawyer for [him and his] wife over a number of years." He was asked whether or not it was his general practice "to consult with him when problems arise?" He said that it was, and testified as follows: Q. "And did you do it with him in this particular situation? A. I sure did. He called me as a friend. Q. Now, on the occasion that you and your wife and Mr. O'Brien came down to our office the Wednesday before the trial, did he come down at you and your wife's personal request with you? A. Yes, he did . . . Q. Mr. Johnson, did you say in response to Mr. Weller's question that you called in Mr. O'Brien as a friend? A. No Mr. O'Brien called me as a friend. Q. Oh, he called you as a friend? All right. A. Strictly as a friend, Mr. Weltner. Q. I. see. Just as a friend. A. Yes, sir. He had been for a long time."

I dissent from the majority. Whether Mr. O'Brien was present as a friend or as an attorney representing either of the state's witnesses, there is no exception carved out of the statute for the presence of anyone other than those "necessary and essential to the preparation of and actual prosecution for the crime specified." See *Orkin v. State*, 236 Ga. 176, 188 (223 SE2d 61). Mr. O'Brien's presence was

neither "necessary" nor "essential" to the preparation or prosecution of this case. Code Ann. § 26-3004 (k).

"Wiretap statute provides a right not only to have unlawful intercepts suppressed as far as use in court is concerned, but also creats [the] right not to be overheard except in conformity with the statutory provisions." United States v. Bernstein, 509 F2d 996 (8) (4th Cir. 1975). This publication of an intercepted communication to an individual not connected with "the preparation of or prosecution of this case" renders it inadmissible. Code Ann. § 26-3004 (k).

The state contends there was no publication. This question has already been settled by the Supreme Court. They held: "This publication took place in a locked office and was a very limited publication for voice identification purposes." *Orkin v. State*, 236 Ga. 176, 190, supra. The facts in the record clearly show that the Supreme Court's statement of what transpired was in error. The actual testimony is that Mr. O'Brien was "in and out" during the playing of the tape to Mr. and Mrs. Johnson and was not hindered by the locked doors.

For the reasons stated above the publication of the tape in Mr. O'Brien's presence was in violation of Code Ann. § 26-3004 and thereby rendered inadmissible.

2. The state attacks defendant's extraordinary motion for new trial as lacking in "diligence," citing *Emmett v. State*, 232 Ga. 110 (7) (205 SE2d 231). *Emmett* holds that it is incumbent on a party seeking

a new trial on the ground of newly discovered evidence to satisfy the court, inter alia: "(2) that it was not owing to the want of due diligence." The state argues that the defendant could have called Johnson as a witness (citing *Harper v. State*, 131 Ga. 771, 774 (63 SE 339)) or cross examined "[t]he district attorney's representatives . . . about what Johnson told them . . ." The record reflects defendant's counsel's letter to the Johnsons before trial to attempt to talk to them was refused. An affidavit of defendant's counsel reveals that a motion to the trial court to require Johnson to submit to examination under oath was denied.

Johnson was never called as a state witness, thus the opportunity for examination by defendant's counsel was completely frustrated. Without examining Johnson it was never revealed that he had played a part in the determination of probable cause for issuance of the investigative warrant or the publication of the intercepted communications. Since these facts were never revealed I cannot fault defendant's counsel for not cross examining members of the district attorney's office as to something he never knew existed. As our Supreme Court stated in *Matthews v. Grace*, 199 Ga. 400, 406 (34 SE2d 454), such evidence "shows an endeavor to discover evidence of the very fact which the new evidence here established. It would be unreasonable to require more . . . It was an abuse of discretion to overrule" the motion for a new trial.

I am authorized to state that Chief Judge Bell and Judges Clark and Smith concur in this dissent.

APPENDIX C

ORKIN et al. v. THE STATE
239 Ga. 334
(Georgia Supreme Court, 1977)

PER CURIAM.

We granted certiorari in *Orkin v. State*, 140 Ga. App. 651 (231 SE2d 481 (1976)), to determine whether the newly discovered evidence in this case requires suppression of wiretap evidence under the exclusionary rule contained in Code Ann. § 26-3004 (k).[1]

Section 26-3004 (k) was construed by this court in *Orkin v. State*, 236 Ga. 176 (3) (223 SE2d 61) (1976). The present case involves the application of that Code section as construed by this court to an admittedly close set of facts.[2] For the purposes of

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1 We originally granted certiorari to determine, additionally, whether the newly discovered evidence proved a violation of Code Ann. §26-3004 (c), thus requiring suppression under § 26-3007. Upon reconsideration, it appears that this question is not properly before this court as it was not raised initially before the Court of Appeals or in the motion for rehearing in that court. See Rule 36 (h), Rules of the Supreme Court of the State of Georgia.

2 We are not prepared to hold that although it may be necessary to replay wiretap evidence to the victim of a crime for voice identification purposes, the victim's attorney is precluded as a matter of law from being present. Assuming this, it is purely an evidentiary question as to whether the presence of the attorney in a particular case is "reasonably necessary and essential."

the writ of certiorari this does not involve a matter of gravity and importance. See Rule 36 (j), Rules of the Supreme Court of the State of Georgia. Therefore, the writ of certiorari will be dismissed as improvidently granted.

Writ dismissed. All the Justices concur, except Nichols, C.J., Undercofler, P.J., and Hill, J., who dissent.

ARGUED APRIL 11, 1977 —
DECIDED MAY 12, 1977 —
REHEARING DENIED JUNE 7 and JUNE 30, 1977.

Certiorari to the Court of Appeals of Georgia — 140 Ga. App. 651 (231 SE2d 481) (1976).

Hansell, Post, Brandon & Dorsey, Hugh M. Dorsey, Jr., Allen Post, David J. Bailey, Wesley R. Asinof, for appellants.

Lewis R. Slaton, District Attorney, Carter Goode, Assistant District Attorney, for appellee.

NICHOLS, Chief Justice, dissenting.

The Court of Appeals has refused to pass on whether it was reasonable and necessary to have the victim's attorney present when the tape was played by the district attorney's office. This is not an evidentiary question. If the Court of Appeals had reviewed an application of Code Ann. § 26-3004 (k)'s "reasonable and necessary" standard to the facts of this case, then any further review by this court would be but another review of the evidence and insufficient, therefore, to support a grant of certiorari. That is not the situation here, however. Here the Court of Appeals has hung its hat on the fact that

the person overhearing the tape was the victim's attorney. This approach by the Court of Appeals completely ignores an earlier decision by this court in this same case that an analysis of "reasonable necessity and essentiality" is mandated by Code Ann. § 26-3004 (k). See *Orkin v. State*, 236 Ga. 176 (223 SE2d 61) (1976). *Nowhere* in §26-3004(k) can such an exception be found. Nowhere does the statute allow those parties to whom publication is reasonable and necessary to be accompanied by an attorney. The attorney *must* be subject to the same test as all parties hearing the tape.

It is indubitably obvious that this test has not been applied. This is not, in my opinion, merely an evidentiary question. Rather, it is a question of the application of a statute protecting the guarded and hallowed right of privacy, a question of undoubted importance and of the deepest gravity. Therefore, I respectfully dissent from the majority's dismissal of the appeal.

I am authorized to state that Justice Hill joins in this dissent.

UNDERCOFLER, Presiding Justice, dissenting.

Orkin made an incriminating statement over a telephone. The telephone was tapped. The application for the telephone tap warrant did not name Orkin. The state had probable cause to believe Orkin was engaged in criminal activity and Orkin was a primary target of the telephone tap. Not naming him excludes the intercepted statement from evidence. United States v. Donovan, —— U. S. —— (97 SC 658, 50 LE2d 652).

I am authorized to state that Chief Justice Nichols joins in this dissent.

APPENDIX D

320 23

SUPREME COURT OF GEORGIA

Atlanta, February 11, 1977

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

William B. Orkin et al. v. The State

Upon consideration of the motion for reconsideration filed in this case, it is ordered that the judgment of this court rendered therein on January 28, 1977, be hereby vacated. All the Justices concur, except Gunter, J., who dissents.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta, February 11, 1977

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

HAZEL E. HALLFORD, Deputy Clerk.

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

ATLANTA, February 11, 1977

Dear Sir:

Case No. 32023 WILLIAM B. ORKIN ET AL. V. THE STATE.

The Supreme Court today granted the writ of certiorari in this case. All the Justices concur, except Gunter, J. who dissents.

IF ORAL ARGUMENT IS REQUESTED, THIS CASE WILL BE ASSIGNED TO THE APRIL CALENDAR. IF ORAL ARGUMENT IS NOT REQUESTED, IT WILL BE SUBMITTED TO THE COURT ON WRITTEN BRIEFS. CALENDARS SHOWING EXACT DATES FOR WHICH CASES ARE SET WILL BE MAILED THE LAST OF MARCH.

The Court is particularly concerned with the following:

> Does the newly discovered evidence as to the pre-trial publication of the tapes and whether there was probable cause to believe appellant was a party to the conspiracy require suppression of the tapes under the Georgia wiretap statute, particularly in light of the recent U. S. Supreme Court decision in U. S. v. Donovan?

Briefs filed in the Court of Appeals are included in the record presented to this court. Additional briefs are not required but may be submitted.

Very truly yours,
Mrs. Joline B. Williams, Clerk

APPENDIX E

ACTS OF CONGRESS

18 U.S.C. §2518(10)(a) provides as follows:

> Any aggreived person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—
>
> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> (iii) the interception was not made in conformity with the order of authorization or approval.
>
> Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggreived person, may in his discretion make available to the aggreived

person or his counsel for inspection such portions of the intercepted communications or evidence derived therefrom as the judge determines to be in the interests of justice.

STATUTES OF THE GENERAL ASSEMBLY OF GEORGIA

Section 26-3004(c) of the Criminal Code of Georgia provides as follows:

"(c) When there is probable cause to believe that a person is committing or has committed an act which endangers the national security of the United States or the security of this State or that such person is committing or has committed the crime of treason, insurrection, rebellion, espionage, sabotage, or any felony involving bodily harm, or any crimes involving kidnapping, narcotics, dangerous drugs, burglary, prostitution, theft, blackmail, extortion, bribery, gambling or any felony involving alcoholic beverage laws, auto thefts, or there is probable cause to believe that a private place is being utilized or has been utilized for the commission of any such crime, then, upon written application, under oath, of the district attorney of the circuit wherein the device is to be physically placed, or the Attorney General, which application affirms that there is probable cause to believe (1) that a person is committing or has committed any of the crimes enumerated in this subsection, or (2) that a private place is being utilized or has been utilized for the commission of any of the crimes enumerated in this subsection and sets forth specifically the basis of such probable cause and particularly describes the person or place, the crime or crimes, the device or devices to be used, and the specific conversations and activities to be overheard or observed, as the case may be, any judge of the superior court of the circuit aforesaid may issue an investigation warrant permitting the use of devices, as defined by section 26-3009, for the surveillance of such person or place provided such warrant specifies with particularity the device or devices the use of which is to be thereby permitted, the purpose, duration and circumstances of use permitted, the crime or crimes allegedly being committed, and the person or persons and place or places to be subject to such surveillance."

Section 26-3007 of the Criminal Code of Georgia provides as follows:

"No evidence obtained in a manner which violates any of the provisions of this Chapter shall be admissible in any court of this State, except to prove violations of this Chapter." (Acts 1968, pp. 1249, 1334)

At the time of the Petitioners' trial, Georgia Code of 1933, §59-106, which has subsequently been amended in a manner not relevant to this case, provided as follows:

"At least biennially, or, if the senior judge of the superior court shall direct, at least annually, the board of jury commissioners shall compile and maintain and revise a jury list of intelligent and upright citizens of the county to serve as jurors.

In composing such list the commissioners shall select a fairly representative cross-section of the intelligent and upright citizens of the county from the official registered voters' list of the county as most recently revised by the county board of registrars or other county election officials. If at any time it appears to the jury commissioners that the jury list, so composed, is not a fairly representative cross-section of the intelligent and upright citizens of the county, they shall supplement such list by going out into the county and personally acquainting themselves with other citizens of the county, including intelligent and upright citizens of any significantly identifiable group in the county which may not be fairly representative thereon.

"After selecting the citizens to serve as jurors, the jury commissioners shall select from the jury list a sufficient number of the most experienced, intelligent and upright citizens, not exceeding two-fifths of the whole number, to serve as grand jurors. The entire number first selected, including those afterwards selected as grand jurors, shall constitute the body of traverse jurors for the county, except as otherwise provided herein, and no new names shall be added until those names originally selected have been completely exhausted, except when a name which has already been drawn for the same term as a grand juror shall also be drawn as a traverse juror, such name shall be returned to the box and another drawn in its stead."

At the time of the Petitioners' trial, Georgia Code of 1933, §59-201, which has subsequently been

amended in a manner which is not here relevant, provided as follows:

"All citizens of this State, above the age of 21 years, being neither idiots, lunatics, nor insane, who have resided in the county for six months preceding the time of serving, and who are the most experienced, intelligent, and upright persons, are qualified, and liable to serve as grand jurors, unless exempted by law: Provided, however, that all elected public officers and officials, county commissioners, tax receivers, tax collectors, members of the county board of education, county school commissioners, judges of the probate courts, and county treasurers shall be incompetent to serve as grand jurors during their respective terms of office."

APPENDIX F

IN THE SUPERIOR COURT OF FULTON COUNTY

THE STATE
VS.
WILLIAM B. ORKIN } **CASE NO. A-22153**

FURTHER MOTION TO SUPPRESS BY WM. B. ORKIN

Now comes defendant, William B. Orkin, and moves the Court to suppress for use as evidence two rolls of recording tape, and all evidence derived therefrom, containing the conversations of William B. Orkin seized by agents of the District Attorney of this circuit of intercepted telephonic communications, and shows the following:

1.

All of the allegations of the motion to suppress an amendment filed by Bobby Charles Bowen in this same case are hereby adopted in toto as fully as if they had been set out verbatim in this motion.

2.

In addition thereto this defendant specifically moves to suppress the tape recordings and all evidence derived therefrom containing the conversations of this defendant on the ground that the defendant William B. Orkin was not an unknown person and his identity was known to the affiants and the District Attorney of the Atlanta Judicial

Circuit at the time the application or petition of said District Attorney was presented to Judge Ernest Tidwell for an order to conduct a surveillance of Bobby Charles Bowen and other unknown persons.

3.

Defendant Orkin shows that because of the foregoing facts the seizure of defendants conversations and recording of same was made in violation of Title 18 U.S.C.A. section 2518(1)(b)(IV) requiring the application to include "the identity of the person, if known, committing the offense and whose communication are to be intercepted and Title 2518 U.S.C.A. of Title 18 sub-sections (4)(a) requiring the order of authorization to specify "the identity of the person, if known, whose communications are to be intercepted."

WHEREFORE, defendant prays that this motion be granted.

DURWOOD T. PYE
Attorney for Defendant

120 Linden Avenue, N. E.
Atlanta, Georgia

875-5501

IN THE SUPERIOR COURT FOR THE COUNTY OF FULTON STATE OF GEORGIA

THE STATE VS. WILLIAM B. ORKIN and BOBBY CHARLES BOWEN	INDICTMENT NO. A-22153 CONSPIRACY TO COMMIT MURDER

ORDER

The motion, as amended, by both defendants to suppress evidence obtained by electronic surveillance, both pursuant to Court Order and without Court Order, having come on for hearing and the Court having considered evidence in the form of testimony, contents of original tape recordings and documentary evidence, the Court having heard argument of counsel by brief and orally, the Court hereby overrules the said motions, as amended, and rules that the said evidence was lawfully and properly obtained, provided, however, that certain conversations which are delineated by this order in Exhibit "A", which is attached hereto and incorporated herein by reference, are suppressed as irrelevant.

Said Exhibit "A" is to be detached herefrom by the Clerk of Court and sealed without publication or disclosure until further order of the Court.

SO ORDERED, this 4th day of September, 1974.

OSGOOD O. WILLIAMS
Judge, Fulton Superior Court
Atlanta Judicial Circuit

APPENDIX G

IN THE SUPERIOR COURT OF FULTON COUNTY STATE OF GEORGIA

THE STATE VS. WILLIAM B. ORKIN and BOBBY CHARLES BOWEN	INDICTMENT NO. A-22153 **MOTION TO QUASH INDICTMENT**

Comes now defendant WILLIAM B. ORKIN and moves to quash the indictment returned against him by the Fulton County Grand Jury, impanelled for the May-June, 1974, Term, and for reason therefor shows as follows:

1.

Said Grand Jury was illegally and unconstitutionally impanelled inasmuch as there was systematically excluded from the said Grand Jury all citizens of Fulton County who were of age under the laws of the State of Georgia but who were less than twenty-one years of age, the same being violative of his rights under the Fourteenth Amendment to the Constitution of the United States, guaranteeing to him due process and equal protection of the law, and denying to the class of potential jurors the privilege of participating equally in the administration of justice — and further denying to plaintiff a fair possibility for obtaining a representative cross-section of the community, inasmuch as the same constitutes the systematic exclusion of an identifiable group from Grand Jury service.

2.

Further, the aforesaid indictment is illegal, void, and unconstitutional inasmuch as the jurors were selected pursuant to a provision of Georgia law which is on its face unconstitutional, to-wit: the Acts of 1887, p. 53; 1953 Nov. Sess., pp. 284, 287; 1973 p. 726, (Ga. Code Ann. §59-201), in that the aforesaid Act, by its terms, excludes citizens of the United States, who are under the laws of the State of Georgia sui juris, but are of an age less than twenty-one years, petitioner's rights, as set forth in the preceding paragraph hereof, being violated by virtue of the implementation by the public officials of Fulton County of the aforesaid Act.

3.

The aforesaid indictment is unconstitutional, null, illegal, and void, for further reasons that petitioner was denied his right to appear before the Grand Jury at such time as it was considering evidence offered by the State in support of the proposed indictment, and was denied the right to cross-examine witnesses, to present evidence on his own behalf, and denied the right to effective counsel, together with other rights incidental or necessary thereto. Specifically, petitioner shows that the Grand Jury system of the State of Georgia is unconstitutional for reason that it establishes a discriminatory basis for the return of indictments, inasmuch as public officials, under the laws of the State of Georgia, have, on some occasions, the right to appear before a Grand Jury, to testify on their own behalf, to be represented by counsel, and to offer evidence on their own behalf. (See Georgia Laws, 1943, pp. 284,287 (Ga. Code Ann.

§40-1617) and Georgia Laws, 1865-66, pp. 233, 243; 1873, pp. 23, 24; 1895, p. 63. (Ga. Code Ann. §89-9907).

The according of certain rights and privileges to persons who hold public office, and denial of those same rights and privileges to this defendant, who does not hold a public office, constitutes an arbitrary classification among citizens of this State, and invidious distinction against him, and discrimination against him, all in violation of his rights under the Fourteenth Amendment to the Constitution of the United States assuring to defendant the due process of the law and the equal protection of the laws; and, the same is further violative of his rights under the Constitution of the State of Georgia, specifically Article I, Par. II (§2-102, Ga. Code Ann.) guaranteeing to defendant that protection of his person and property shall be the paramount duty of the Government, and that such protection shall be impartial and complete.

WHEREFORE, this defendant prays that the Court set a hearing upon this his motion to quash and dismiss the indictment, and that it enter its order quashing and disimissing the indictment, and discharging and relieving him therefrom.

CHARLES L. WELTNER, OF
COUNSEL FOR DEFENDANT
WILLIAM B. ORKIN

2130 First National Bank Tower
Atlanta, Georgia 30303
658-9550

IN THE SUPERIOR COURT OF FULTON COUNTY STATE OF GEORGIA

THE STATE VS. WILLIAM B. ORKIN and BOBBY CHARLES BOWEN	INDICTMENT No. A-22153 **DEFENDANT ORKIN'S FIRST AMENDMENT TO HIS MOTION TO QUASH INDICTMENT**

Comes now defendant William B. Orkin and files this his first amendment to his motion to quash the indictment pending against as follows:

1.

Defendant amends his motion to quash indictment by adding thereto the following additional grounds for the relief sought:

4.

The Grand Jury was illegally and unconstitutionally impanelled inasmuch as there were systematically excluded from the said Grand Jury citizens of Fulton County, specifically young adults under the age of thirty years of age, to such extent, and by such great disparity, as to constitute an unconstitutionally and discriminatory impanelled Grand Jury list, denying to young adults of Fulton County (under the age of thirty) the privilege of participating equally in the administration of justice, and denying to this defendant a

fair possibility for obtaining a representative cross-section of the community by virtue of such exclusion of an identifiable group from Grand Jury service.

2.

The motion to quash as originally filed is further amended by striking from Paragraph 1 thereof, as it appears in the fourth line from the bottom thereof, the word "plaintiff" and substituting in lieu thereof the words "this defendant".

CHARLES L. WELTNER, OF
COUNSEL FOR DEFENDANT
WILLIAM B. ORKIN

WELTNER, KIDD, CRUMBLEY & TATE
2130 First National Bank Tower
Atlanta, Georgia 30303
658-9550

IN THE SUPERIOR COURT FOR THE COUNTY OF FULTON STATE OF GEORGIA

THE STATE VS. WILLIAM B. ORKIN and ROBERT CHARLES BOWEN	INDICTMENT NO. A-22153

Hearing had before THE HONORABLE OSGOOD O. WILLIAMS commencing September 13, 1974, in Atlanta, Georgia.

TRANSCRIPT OF THE PROCEEDINGS

APPEARANCES OF COUNSEL:

On Behalf of the State:

Melvin England,
Assistant District Attorney
William Weller,
Assistant District Attorney

On Behalf of the Defendant Orkin:

Charles L. Weltner, Esq.
Durwood T. Pye, Esq.
Tom Pye, Esq.
Lewis M. Groover, Esq.

On Behalf of the Defendant Bowen:

Wesley R. Asinof, Sr., Esq.

Reported by:
Edward Noriega
Official Court Reporter

* * *

THE COURT: Be seated, gentlemen.

The Court has studied the questionnaires and finds that there were a few selected prospective Grand Jurors in the book certified by the Jury Commissioners that were not reflected by the questionnaires here, which are the ones which have been offered and admitted in evidence. I've called Mrs. Witcher's attention to that fact and she may have further searched her files and there were a few additional questionnaires that should have been here in the group.

I feel that these particular questionnaires, all of whom are in the book as prospective jurors, selected from the questionnaires, should be in evidence. Here, there's just a few of them and that makes the number accord correctly.

MR. WELTNER: Your Honor, whatever it shows, we'd have to object.

THE COURT: I've checked them personally.

MR. WELTNER: No objections. They simply can be added to Defendant's Exhibit 1 and serve as component parts thereof.

THE COURT: Any objections?

MR. ENGLAND: No, sir. No objection.

THE COURT: Let them be admitted. That means the questionnaires accord with the book.

Now gentlemen, I've studied these questionnaires, each one as a matter of fact, with the exception of a very small group, about like that, that I didn't quite finish and here's what my analysis is in the various age groups. I'll be glad to give counsels a copy of my computations in case I've made any errors mathematically so that you might point it out to me, and wherein I made such an error. I don't claim to be a mathematician, but here's what I have analyzed in the various age groups as reflected by the questionnaires.

Twenty-five years and under, one and one half percent of prospective jurors in the box.

Thirty-five years and under, twenty and seven tenths percent. That is to say, they're in the box. In the Grand Jury box. Persons who are thirty-five years and under. That constitutes twenty point seven percent of the total in the box.

Forty years and under, thirty-four point six percent.

Fifty years and under, sixty-three point nine percent.

Sixty years and under, eight-eight point two percent.

Thirty-six years and over — thirty-six years and

over, that is to say, those within the age group of thirty-six years and over and in the Grand Jury box, constitutes seventy-nine point two percent.

Sixty-five years and over, six point three percent. Six point three percent. That's sixty-five years and over.

Seventy years and over, two point two percent. That is to say, in the Grand Jury box, there are two point two percent of the total who are seventy years or over.

Seventy-five years and over, four tenths of a percent. Point four. That's seventy-five years and over.

Ages thirty through fifty; age group of those who are thirty years of age through fifty years of age that were of a percentage in the Grand Jury box are fifty-three point seven. That's a range of from thirty to fifty, constitutes fifty-three point seven percent.

Ages thirty through sixty in the Grand Jury box, the percentage of those in that group in that age group is seventy-eight point one percent. Seventy-eight point one percent.

One other survey and this is the last that I made are ages twenty-five; that is to say, twenty-five years of age through and including forty years of age in the Grand Jury box, thirty-one point nine percent.

Now gentlemen, those are the analyzations that I made by computation, calculations, rather, calculations.

* * *

You may proceed.

MR. WELTNER: May it please the Court, upon an opportunity to examine the analysis by the County Statistical Office, it occurred to me that it would be important to submit to the Court additional grounds for a Motion to Quash. I've served copies and paragraph 4, which challenges this Grand Jury pool by reason of the exclusion of young adults under the age of thirty and I'd like to file that amendment at this time.

THE COURT: All right, sir.

MR. WELTNER: Secondly, for the completion of the record, it's presented and in any event, insignificant, but the Grand Jurors list in use prior to the previous list, was completed July 8th, 1971 and I'd like for that fact to appear in the record, by appearing by stipulation.

MR. ENGLAND: Your Honor, we don't have any objections to that, but we don't see the relevancy of it.

THE COURT: All right, sir.

MR. WELTNER: Secondly, your Honor, may I supplement the record by attaching to it a copy of the statistical analysis which was furnished by the data processing?

THE COURT: Yes, that's the same copy that I have.

MR. WELTNER: This copy was furnished me by your office, your Honor.

MR. ENGLAND: No objections.

MR. WELTNER: Can we stipulate that it's marked an exhibit or just add it to the record? I believe that for the purpose of the record, probably should be marked as an exhibit.

Your Honor please, Defendant's Exhibit 4 is offered with the understanding that the prior pool was in effect after its completion date of July 8th?

MR. WELLER: Of '71,

MR. WELTNER: '71 due the first time in Court.

MR. WELLER: Well, through December 31 of '73. That's the period of time that the prior pool was in effect.

MR. WELTNER: That's right.

THE COURT: All right.

MR. WELTNER: Defendant's Exhibit 5 is offered, which is a copy of the statistical analysis of the questionnaires furnished through the courtesy of the Court.

MR. ENGLAND: No objections.

THE COURT: Let it be admitted.

MR. WELTNER: For the purposes of argument

only, your Honor, may I submit to the Court a copy of Defendant's Exhibit 5 which contains a mathematical calculation which I've given Mr. England a copy and I'm now offering that in evidence.

Well, it's on a different scale, so it's not a matter of comparison.

THE COURT: You haven't had a chance to compare.

MR. ENGLAND: Your Honor, I understand he's not offering it in evidence.

THE COURT: Just for the purpose of aiding the Court. May I have that so I can see how it looks.

MR. WELLER: Judge, one point of clarification. Do I understand your computations include a small group that was not submitted?

THE COURT: Yes, sir, that's right, definitely. But now let me say this to you. Actually, gentlemen, in making the little change insofar as the questionnaire is concerned it did not in anywise depreciate, the change did not change it. Here's one was changed from sixty-five years and over for instance and a change of seven percent to six point three percent. Well, that's not a depreciable percentage. Thirty through sixty for instance, was seventy-eight percent before we had the additional questionnaires where it was changed to seventy-eight point one. Just one percent change and it's thirty through fifty, the original, the original computation or calculations and percentage basis was fifty-four percent to fifty-three

point seven. So you see, no appreciable change even though there's additional questionnaires.

So you may proceed.

MR. WELTNER: Your Honor, may we observe that the calculations which are before the Court, the unnumbered list is an effort on my part to compare percentages as to age groups within the Grand Jury pool to the same age groups delineated in Defendant's Exhibit 3, which is the Census Population for Fulton County by age. For that reason, I've used your Honor's years such as twenty-five to twenty-nine where the Court has included another year up and would have used the year twenty to twenty-five, so to obtain a cross reference as to the relationship of the percentages of certain age groups within the jury box, that same age in the community at large used as twenty to twenty-four, twenty-five through twenty-nine which is ranging and breakdown and use Defendant's Exhibit 3 being the United States Census indicated on that basis. Thereafter, your Honor, if I could make a brief reference to what my analysis of the evidence now shows and then I'll proceed very briefly with the citations of a few authorities.

Your Honor, if you'll look at the bottom of that first list it shows that inasmuch as there's one person under the age of twenty-one in the Grand Jury that's five hundredths of one percent of the Grand Jury box chaired. Eight point six percent of the adult population at large. If your calculations are made on the basis of the jury box of ages eighteen through twenty-five, then the jury box contains seven tenths

of one percent of the potential Grand Jurors chaired to a population percentage of twenty-two point nine. And if the Court please, if you extend that up further from the years eighteen to twenty-nine, the young adults under the age of twenty which is the group identified or group suggested in my amended Motion to Quash, then the jury box contains eight point three percent of the persons of that age group as compared to the community at large which is thirty-four point six percent or over one third of the adult population. Now, I don't know whether my mathematics are correct, but examining within these three categories, the rational, ratio by which the community at large percentage exceeds the Grand Jury, I find that with regard to eighteen to twenty group, one out of 1797, about an infinity to one ratio. Eighteen to twenty-four of the community population percentage exceeding the Grand Jury percentage by a ratio of thirty to one. Eighteen to twenty-nine of young adults under the age of twenty in the community population at large exceeds the Grand Jury percentage by a ratio of four to one. Your Honor, I think this is a matter that comes within the cases that your Honor has cited to counsel and the cases that I researched and have been able to find, comes plainly within the rule in *White* —

The COURT: I'm familiar with that.

MR. WELTNER: Your Honor cited that. What did your Honor call it?

THE COURT: I think it's called, I believe, *White*.

MR. WELTNER: I believe your Honor called it Whitter, which may be correct.

THE COURT: Whitter or White.

MR. WELTNER: At any rate, it's a case which the Court cited which is found in *385 U.S. 545*. I'd like to outline and parallel within that situation and case in Mitchell County and the White's within Fulton County of the same State. Same statutory constitutional requirements with regard to the composition of the Grand Jury.

THE COURT: I'm familiar with the County.

MR. WELTNER: Yes, sir. I understand, your Honor. Probably your Honor in reading this case can see the faces of the actors.

THE COURT: And the members.

MR. WELTNER: Now your Honor, in *Whitus*, the Jury Commissioners selected a Grand Jury pool upon the record which contained the potential of discrimination, your Honor, and that is there was on the tax slips "C" on them for black people. In the case at Bar, the Grand Jurors are selected from records that had age designation. In *Whitus* and in this case the class is identifiable and the case was clearly identifiable by the selectors, the Jury Commission. In *Whitus* the officers of the County got on the stand and said we didn't pay no attention to those "C" marks written on them. We tried to get as best qualified people we could to serve on the Grand Jury. We didn't discriminate on anybody for any reason. That exactly was the testimony and I do not mean to impugn, but that was the testimony of Mr. Wells and Mr. Sturdevant here before your

Honor as they sat there, that they made no conscientious discrimination between young people. In *Whitus* the Court examined the disparity of the blacks as compared to the community at large and they found that the disparity in the *Whitus case* to be nine point one percent in the Grand Jury list as compared to twenty-seven point one percent upon the tax digest from which any list was chosen, about nine point one percent representation in the Grand Jury list as compared to twenty-seven point one percent on the source. Namely, that's a three to one disparity. In the case at Bar, your Honor, there's a four to one disparity. So, I think that in every material aspect of the case at Bar and the *Whitus*, with the only exception, identifiable class; in the *Whitus*, white and black people identifiable and the case at Bar was young people and *Whitus* is plain compelling authority that the mere disparity of three to one in *Whitus* and four to one here raises a prima facie case of exclusion. Secondly, the fact that the officers said they didn't intentionally seek to exclude anyone on the basis of class, does not overcome the prima facie case, so I submit this in a case which is almost down the line point for point and exactly the situation before us.

Now without belaboring the Court, inasmuch as the Court has read all these opinions, I'll simply mention the case of *Peters versus* [*Kiff*] which doesn't mention class. It mentions the case of *Turner versus* [*Fouche*], in which that, too, your Honor, was a case dealing with the Grand Jury list, the percentages; percent of black in the box was thirty-seven percent and the population was sixty-five, a disparity of one point six one, not even two to one. That was

held by the Supreme Court to be an exclusion of an identifiable class. In the case of *Carter*, which the Court has cited to us, there was a disparity of only two to one and thirty-two percent black was listed, chaired out of a population of sixty-five percent, That was two to one. Your Honor's familiar with the *White and Gruell* in our own State. Not any question of those two decisions being an identifiable exclusion from jury service a substantial identifiable class of citizens. The impact is too subtle. The *Peters case* says there's no requirement that Mr. Orkin can show that he personally was prejudiced by the exclusion of that identifiable class. No question since *Gruell* that this language, purposeful discrimination is necessary where there's such a marked disparity between the percentages of class on the jury rolls and the percentages of class in the total community is proved; a prima facie case of discrimination. That has been held to be, citing the *Whitus* situation. Then Judge Stokes went on to say that the testimony by the Commissioners that there has been no exclusion or rejection because of race or color is insufficient to overcome the prima facie case.

Now your Honor, I submit this brief analysis that we have shown in this testimony and in the documentary evidence is a prima facie case of exclusion of an identifiable class of the community and if the motion is to be resisted, it can only be resisted by the State overcoming the prima facie case and the calling of two Jury Commissioners and their testimony, it has been held in *Whitus* and many other cases which your Honor's familiar with, not to constitute the overcoming of that prima facie case that exists by a virtue of the disparity itself.

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IN THE SUPERIOR COURT OF FULTON COUNTY STATE OF GEORGIA

THE STATE VS. WILLIAM B. ORKIN and BOBBY CHARLES BOWEN	INDICTMENT NO. A-22153 **MOTION TO QUASH INDICTMENT**

ORDER

The above captioned motion, as amended, filed in behalf of Defendant Orkin only and not joined in by Defendant Bowen, moving to quash the indictment on four grounds, having come on for hearing, the Court having heard and considered testimonial and demonstrative evidence, in addition to argument by Counsel for both sides, the motion is hereby overruled on each and all grounds.

SO ORDERED this 19th day of September, 1974.

OSGOOD O. WILLIAMS, Judge
Fulton Superior Court, A.J.C.

APPENDIX H

(Excerpts from Pages 391-450 and 865-866 of the Trial Transcript)

IN THE SUPERIOR COURT OF FULTON COUNTY STATE OF GEORGIA

THE STATE VS. WILLIAM B. ORKIN ROBERT CHARLES BOWEN	INDICTMENT NO. A-22153

Trial had before THE HONORABLE OSGOOD O. WILLIAMS and a jury, commencing September 24, 1974, in Atlanta, Georgia.

TRANSCRIPT OF THE TRIAL

APPEARANCES OF COUNSEL:

On Behalf of the State:

Melvin England,
Assistant District Attorney
William Weller,
Assistant District Attorney

On Behalf of the Defendant Orkin:

Charles L. Weltner, Esq.
Durwood T. Pye, Esq.
Tom Pye, Esq.
Lewis M. Groover, Esq.

On Behalf of the Defendant Bowen:
Wesley R. Asinof, Sr., Esq.

Reported by:
Edward Noriega
Official Court Reporter

CHAPTER I

• • •

MR. WELLER [Assistant District Attorney]: Your Honor, at this time may we inquire into conversations?

THE COURT: I believe we probably should have a little recess at this time. Ladies and gentlemen, we will have about a ten-minute recess.

(Whereupon the jury left the courtroom and a brief recess was had and then the Court resumed the trial of the case.)

THE COURT: All right, now, Mr. Weller, you may proceed.

MR. WELLER: Judge, before the jury comes in, I would like to inquire of the Court at this time if we could go into the conversation Mr. Matthews heard over the telephone, since we have connected up substantial evidence during the course of his testimony.

• • •

[There followed a lengthy colloquy between counsel and the Court concerning whether evidence of Bowen's statements could be admitted. The following excerpts show the grounds on which counsel for Petitioners objected to the admission of evidence of those statements.]

MR. ASINOF [Attorney for Bowen]: . . . I see that Mr. England [prosecutor] is familiar with the *Bruton case* and also with the cited *Evans case*, *Evans versus* [*Dutton*], I believe. I would like to bring to your attention *Evans versus* [*Dutton*], a killing of a police officer in Gwinnett County.

THE COURT: I remember that.

MR. ASINOF: The Supreme Court of the United States reversed the Fifth Circuit. The Fifth Circuit decided, held that his conviction was illegal because of the admission into evidence of declarations where he didn't have the right to cross-examine the declarant. The Supreme Court reversed five to four, but in the reversal and in the majority opinion, the Supreme Court recognized there was direct evidence against evidence in the form of an eyewitness to the killing, and for that reason they made this statement that this evidence was not crucial, and was not devastating.

Now, in the *Park case*, which was decided by the Fifth Circuit Court of Appeals just a few months ago, Park versus — that is *A. C. Park against the warden*, which has gone all the way through the Supreme Court —

THE COURT: And affirmed by the Supreme

Court of Georgia.

MR. ASINOF: Yes, They held in that case that the — that the testimony — that was my case that I had, that I had tried up in Jefferson, that the testimony of a coconspirator who testified and was permitted to testify as to the declaration of a third coconspirator, paid to — inculpating the defendant Park, they held was inadmissible and in citing the *Evans case*, they said that they recognized that in Evans' was not crucial or devastating, but in Park's, in that case it was the sole connecting link to connect Park with the conspirator. That is exactly what we have here.

THE COURT: It was the old man case.

MR. ASINOF: Yes, the old man case. That is exactly what we have here. And the Fifth Circuit held it was inadmissible and reversed the conviction.

Now, the criteria of that case distinguishes Evans from Park's. If the State has sufficient evidence as they had in Evans' to make out a case without it, then it's more or less a harmless error, or harmless to admit it. That's the effect, because it was not crucial or devastating. That is what the Fifth Justices held. Where it's evidence, it becomes crucial and devastating and those are the two words used by the Supreme Court of the United States and used by the Fifth Circuit in a very well-worded decision, [W]isdom of the Fifth Circuit, and concurred in by Judge Simpson, that where the admissibility of that evidence hinges upon whether or not it was crucial and devastating to the defendant, crucial to the case

and devastating to the defendants. It is inadmissible because of Fifth Amendment right of confrontation. For this reason, and it's almost identical with the point we have now before the Court, the State had not proved a prima facie case of conspiracy linking up the old man with the four conspirators.

THE COURT: Did he ever do that?

MR. ASINOF: Sir?

THE COURT: In this case, did the State ever prove it?

MR. ASINOF: No, except by — well, yes, by the declaration.

THE COURT: That's all.

MR. ASINOF: That's right. And it was upon that declaration — it was upon that declaration that the Supreme Court of Georgia said this.

THE COURT: And affirmed the lower court.

MR. ASINOF: And affirmed the lower court. Now, this is what they said. They said that the evidence shows a conspiracy, a conspiracy to violate the liquor laws. And one conspirator made a statement or declaration to another conspirator in which he mentioned the old man as being one conspirator.

THE COURT: That's right.

MR. ASINOF: Now, the Fifth Circuit said that what the Supreme Court of Georgia overlooked was

the fact that there were two conspirators involved, one in violating the liquor laws and the other to violate murder. And Park was not a party to that except by the declaration that he made, what he said, the old man, the old man was — one, you have the same thing here, the very declaration that was admitted, your Honor, was because of the fact that the old man was the one that was furnishing the money for the killing. That's exactly what you have got in this case right here. Only instead of old man, you have Mr. Orkin. So what you have got is the identical situation. And we say clearly that it is inadmissible until the State has first proved a prima facie case of conspiracy, they can't hold themselves up by their own bootstraps.

MR. ENGLAND: The Court put his finger right on the point. If the Court gets to the end of this case and didn't find prima facie showing, the Court wouldn't let the case go to the jury.

MR. ASINOF: The Court can recognize the Fifth Circuit Court of Appeals in New Orleans.

MR. ENGLAND: You have a wiretap or Orkin talking implicating himself, you have another —

MR. WELTNER: No. not in evidence, your Honor.

THE COURT: I want to look briefly at one or two decisions. I hadn't had a chance to do it during the lunch hour. This is a good time to let them go to lunch.

MR. ASINOF: Over the lunch hour, I will run

back to the office and get it.

THE COURT: I think I have it.

MR. ASINOF: I have a brief with all it says because I used it in the *Park case.*

MR. WELLER: You want the citation? 391 U.S. 123. . . .

[Whereupon the Court took a recess, after which the argument of counsel was continued as follows.]

* * *

THE COURT: Do you wish to make a further remark?

MR. ASINOF: Your Honor please, during the noon recess, I obtained a copy of the decision in the *Park case*, and Mr. Weltner, I believe you have it.

MR. WELTNER: The Court has it before it.

I simply observed that the language showing to that case is very strong implementation of the Sixth Amendment through the Fourteenth Amendment to the right of any person accused of a crime to be confronted.

Now, where these declarations sought to be admitted for any purpose, either conditionally or show background or for any other purpose, they would be admitted under circumstances and to the jury under circumstances which by virtue of the circumstance of the declarant being indicted as a cocon-

spirator would — my client — would deprive my client of the right of cross-examination. I think it's on that basis that the Fifth Circuit in the *Park case* granted the motion for right of Habeas Corpus giving to that Sixth Amendment its full import.

Now, I can simply state, your Honor, that were I desirous of calling Mr. Bowen to examine him as to the truth or falsity of any declaration which might be admitted, it's quite likely the case, or it certainly would be within his right to simply refuse to respond. There's no way in this instance that this defendant can be assured the right of confrontation of declarations which I would anticipate we might expect to be of the same gravity as those as quantified by the Fifth Circuit. Has to be crucial if not devastating. And for that reason and the Sixth Amendment and the Fourteenth Amendment, we also move that the Court in the exercise of its discretion, and we move as a matter of right that conversation be not submitted to the jury at this time.

MR. ASINOF: May it please your Honor, I would like to just state to the Court certain excerpts from the *Park case* that I think are very appropriate in the instant case. In the *Park case*, and I am quoting, it says, "Indeed the only evidence directly implicating Park in the slaying came from ceased lips."

THE COURT: I read that.

MR. ASINOF: Has your Honor read the case?

THE COURT: Yes.

MR. ASINOF: Well, my point is, of course, as to

putting the *Park case* together with the *Bruton case* and then *Roberts versus Russell*, which says the same thing, only from a statement standpoint; when you put the two together, you find that on the one hand that where they're being jointly tried it's prejudicial for the declaration of one to go into evidence against the one who made them, the declarant. It's prejudicial as to the known declarant and for them to go in and no way for your Honor to charge that to the jury. If you do, if the Court does, then, of course, it would be a violation of the rule, and, so, for that reason, we think at this time, in the absence of my previous allende the existence of conspiracy which seems to be conceded by all parties in the absence of these declarations would not be admissible, neither the declaration made by Mr. Orkin would not be admissible against Mr. Bowen, and declarations made by Mr. Bowen implicating Orkin would not be admissible.

MR. ENGLAND: The guilt question is not in issue. I don't need to respond any further. The Court's already observed that admissibility is not the issue. Unless the Court has any further inquiry.

THE COURT: I read the case. As a matter of fact I read two, three others during the lunch hour. One case is *Bennett versus the State* is not the point here. *Evans case*, and that case, was discussed by the Supreme Court of Georgia after the Evans case came out, the Supreme Court of the United States. Overrule the objection. You may proceed.

MR. WELLER: Could we have Mr. Kimsey unseal the tapes again?

JUDGE PYE: If your Honor please, may we have noted in respect to these conversations, all the same objections heretofore made in relation to other conversations?

THE COURT: So noted for the record. All right, sir. Call the witness back to the stand. Let the jury come in.

(Whereupon the jury entered the courtroom.)

THE COURT: You may proceed, Mr. Weller.

REDIRECT EXAMINATION

[Assistant District Attorney Weller then asked Detective Matthews a series of questions, including these that follow.]

* * *

BY MR. WELLER:

Q Was there any further reference in the conversation that you recall about the other man knowing anything?

A Mr. Armistead asked Mr. Bowen, "How's your man going to know the job's done?" Mr. Bowen related, "I will call him and tell him as soon as it's over."

Then Mr. Armistead made reference, "I would like to meet the son of a bitch with all this money. Does he want any bigger jobs done?"

Mr. Bowen said, "Maybe. How could we get in touch with you?" Mr. Armistead related, "You mean if you want me to do another job?" Mr. Bowen said, "Yes."

Mr. Armistead said, "You can call the Fontainbleau in Miami and ask for the lounge, ask for the bartender George, and tell George you want to get in touch with Cha-Cha, and leave a number and I will get in touch with you."

JUDGE PYE: May it please your Honor, I wish to move to exclude the evidence in reference to the other man, statements by Mr. Matthews with reference to the other man, on the ground that they could not be admissible in evidence against Mr. Orkin.

There is no proof of conspiracy and no opportunity to cross-examine in reference to this declaration, no confrontation of witnesses. The evidence is inadmissible against Mr. Orkin.

THE COURT: I sustain the objection.

JUDGE PYE: I ask your Honor to instruct the jury to disregard that.

THE COURT: Ladies and gentlemen, respecting the latter testimony of the witness now on the stand relating to someone who was, according to his testimony, down in Florida and identified by Mr. Bowen as Cha-Cha, the Court instructs you respecting that you shall give it no consideration in relation to the case of the State against Mr. Orkin.

BY MR. WELLER:

Q At the conclusion of that meeting I will ask you whether or not you received State's Exhibit 19 from Mr. Armistead.

A Yes, sir, I did.

Q I ask you whether or not you received State's Exhibit 18 from Mr. Armistead.

A Yes, sir.

Q I will ask you whether or not you received State's Exhibit 24 from Mr. Armistead.

A Yes, sir.

Q Directing your attention to June 19 of '74 at 12:25 p.m. noontime, I will ask you if you had an occasion to monitor a conversation at the Hilton Inn, Room 483, from 485, between Mr. Bowen and Mr. Armistead.

MR. WELTNER: May it please the Court, I wonder if it would be appropriate at this time to move that any response that the witness gives would be such as to exclude any recollection he might have of any mention of any party charged other than Mr. Bowen with any implication in the subject matter of the conversation, in view of the Court's ruling on the prior testimony?

I think inasmuch as the Court has stricken that, we would like to ask that the Court, if there be any further testimony, direct the witness he is not to direct his responses to such an area.

THE COURT: Relating to a third party?

MR. WELTNER: Yes, sir.

THE COURT: Yes, sir, I will give that direction at this time.

MR. WELLER: Judge, in what respect —

THE COURT: Any testimony relating to references made by hearsay to a third party at this time. The Court will give that direction.

BY MR. WELLER:

Q All right, sir, don't go into anything along those lines at this time, Mr. Matthews.

THE COURT: That would be my direction.

BY MR. WELLER:

Q With respect to this second meeting, tell the Court and jury as best you can, after refreshing your memory, what took place, what conversation occurred, between Mr. Bowen and Mr. Armistead.

A This meeting took place at approximately 12:25 on June 19, 1974. Mr. Bowen again arrived at Room 483 at the Hilton Inn at the airport, Fulton County, and knocked on the door.

Mr. Armistead invited him in. Mr. Armistead asked him if he was carrying a gun. Mr. Bowen related, "No. You are welcome to search me." Mr. Armistead related, "No, there is no need for us to

go into it. Did you bring what I asked you?"

Mr. Bowen related, "It is in the suitcase." He said, "Did you bring the shotgun?" Mr. Brown related, "Yes. And four shells."

Then Mr. Bowen stated, "I also brought the balance of the money and it's in the suitcase so that I won't have to meet with you any more."

Mr. Bowen asked Mr. Armistead if he wanted to count it. Mr. Bowen related — I mean Mr. Armistead related, "No. I will take your word for it because I don't think you are going to cheat me at this stage of the game."

Then Mr. Armistead related that he had looked the area over and he thought it would be best to snatch the guy and take him off because he just didn't like the way things looked downtown.

Then he says, "Now that we have got this aside, and got this, I just want to ask you why do you want this job done." And Mr. Bowen related, "Because he is giving my friend trouble."

MR. WELTNER: Your Honor, I move to strike that on the grounds previously stated, the basis of my requests which were embodied in the Court's direction to the witness.

THE COURT: I overrule the objection.

THE WITNESS: Mr. Armistead asked, "You mean Mr. Orkin?"

MR. WELTNER: Now, your Honor, I think this

is directly what the Court instructed Mr. Matthews not to do.

THE COURT: No, I had reference only to this individual named Cha-Cha. I overrule the objection with respect to this testimony.

MR. WELTNER: If that be the case, your Honor, perhaps I didn't make my motion plain enough.

THE COURT: All right, sir.

MR. WELTNER: My motion is, inasmuch as the Court has instructed the jury with reference to the first reported conversation to disregard, insofar as the defendant William Orkin is concerned, any declaration of the defendant Bowen as reported by the witness which might be considered to implicate Mr. Orkin — inasmuch as the Court has given that direction to the jury and I have moved that the Court instruct this witness to exclude from his testimony any other reference of similar nature on the part of the defendant Bowen which might be construed as implicating the defendant Orkin.

That was my motion, your Honor. I thought the Court had granted that motion.

THE COURT: No, sir. No, sir. Mr. England?

MR. ENGLAND: If your honor pleases, I think in view of the breakdown of communication, I would like to ask the Court if the Court would instruct the jury as to what was excluded and what was not.

THE COURT: I have already instructed the jury

in that regard. I overrule the objection. Go forward.

BY MR. WELLER:

Q What else was related?

A Mr. Armistead asked Mr. Bowen, "Are you sure you are not the one that wants this job done?" Mr. Bowen's reply: "I don't have that kind of money."

Then he says, "Why does he want this man put away? Is he cracking his old lady?" Mr. Bowen replied,

* * *

Q Tell us, if you would, at that time as best you recall the conversation.

JUDGE PYE: If your Honor please, in order that there be no question about it, we do have a continuing objection which your Honor has permitted us to make, do we not, in respect to each and every declaration alleged to have been made by Mr. Bowen upon the ground that it is not evidentiary against Mr. Orkin, there being no proof of conspiracy?

THE COURT: Each and every alleged declaration made by Mr. Matthews. You have stated another ground, one ground there being no prima facie case of conspiracy relating to Mr. Orkin.

The Court regards your objection as heretofore made, together with your other grounds, as being a

continuing objection as relating to each and every conversation.

JUDGE PYE: Thank you, your Honor.

MR. WELTNER: Your Honor, perhaps I simply misunderstood the Court. I thought that the Court directed the jury to disregard insofar as —

THE COURT: No, sir, you did misunderstand me, and maybe I didn't make myself very clear. I had a substantial reason for excluding the testimony at that time —

MR. WELTNER: Yes, sir.

THE COURT: — respecting the individual named Cha-Cha, or referred to as Cha-Cha. That's what I excluded, only that. But in view of the previous rulings of the Court consistent with the previous rulings and the decisions —

MR. WELTNER: If your Honor will grant me one more moment, I thought that the Court's ruling as to exclusion came upon Judge Pye's request that it be stricken.

THE COURT: And so it did. And so it did.

MR. WELTNER: And your Honor, would it not be in order, then, for the jury to be instructed at this point to disregard any further implications as to Mr. Orkin by virtue of the testimony just completed by Mr. Matthews?

THE COURT: No, sir. Overrule the objection. All right.

BY MR. WELLER:

Q All right, Mr. Matthews, Now, directing your

• • •

[The following excerpt is taken from the direct examination of Armistead.]

Q [by Prosecutor William Weller] All right, sir. Go ahead.

A [by Armistead] After we had done that, he asked me what my price was, and at that time I gave a price of $5,000 in advance and $2500 the next day, or when the job was finished. He then produced at that point an undetermined amount of cash, United States currency, which he laid on the floor. Shortly after developed to be $6,000 instead of five, and I gave him a thousand dollars back.

Q All right, sir.

A Well, the conversation continued as to what method we should dispose of Mr. Johnson. He suggested a mugging. I related to him that I had several things I could do to the victim to get rid of him, but that I would need a shotgun. He volunteered information that he did have a shotgun, a sawed off shotgun.

I inquired whether or not it could be checked, that being the serial number could be checked to be traced. He said that he had got it from, I believe, an old country boy, a friend of his. At the time he got it, he understood it couldn't be checked, be traced.

I then pursued the conversation farther to attempt to determine who the man behind the actual killing was, since it had been explained earlier by Mr. Bowen to me that he was doing this for a friend, an employee — employer.

At that point, he identified a man —

MR. WELTNER [counsel for Orkin]: I object to any identification, your Honor, on the part of this witness, on the grounds previously noted as contained in Judge Pye's arguments specifically because of the hearsay nature thereof, inability of confrontation, and the absence of a prima facie case.

THE COURT: I will reserve ruling on that objection at this time.

BY MR. WELLER:

Q All right, sir. Go ahead.

A May I name him?

Q Yes, sir.

A At that time, identified the man who he was representing to be a Mr. William B. Orkin.

• • •

APPENDIX I

IN THE SUPERIOR COURT OF FULTON COUNTY STATE OF GEORGIA

THE STATE VS. WILLIAM B. ORKIN and BOBBY CHARLES BOWEN	NO. A-22153 DEFENDANTS' EXTRAORDINARY MOTION FOR NEW TRIAL ON THE GROUND OF NEWLY DISCOVERED EVIDENCE

Come now defendants, WILLIAM B. ORKIN and BOBBY CHARLES BOWEN, and, without waiving any rights which they might have to pursue review of prior decisions and judgments rendered in the foregoing case, do file this their motion for a new trial on the ground of newly discovered evidence, respectfully showing to the Court as follows:

1.

A central issue in the trial of the case was the admissibility of a tape recording of seized conversations, the same being identified as State's Exhibit 13. The issue as to admissibility was raised in motions to suppress, held prior to trial, and by a series of motions, upon supplemental evidentiary hearings, held during the course of the trial. Specifically, issues were raised prior to the verdict and judgment of conviction as to the validity of the warrant upon which the conversations were seized (the question

of "probable cause" of requiring the name of defendant Orkin to be included in the application for the warrant) and the question of unauthorized publication of seized conversations prior to the trial as governed by the provisions of §26-3004(k).

2.

On February 5, 1975, defendants, through their counsel, discovered certain critically important new evidence, theretofore unknown and unavailable to them, which is probative of the following propositions of fact:

(1) State's Exhibit 13 was published by agents of the State prior to the trial of the case to one Donald E. O'Brien, a private practicing attorney in the City of Atlanta, being then counsel for Mr. and Mrs. Gerald W. Johnson, who were listed on the indictment as witnesses for the State. Subsequent to defendants' conviction, Gerald W. Johnson did file a civil action against defendants seeking to recover in excess of one million dollars. His counsel of record in such action appears as Donald E. O'Brien.

(2) At the time the District Attorney of Fulton County applied for and obtained a warrant to seize defendants' conversations, he, or his assistants, had been told by Gerald W. Johnson that defendant Orkin and the wife of said Johnson, a principal witness for the State, had been engaged in an emotional involvement, and, based upon a three and one-half

hour conversation with Gerald W. Johnson, had been told by said Johnson that defendant Orkin was the only person he might imagine who could possibly wish him physical harm.

(3) At the time of the interception of conversations of defendants, the State, through its agents, did cause simultaneously with the interception thereof, the said conversations to be broadcast by police frequency radio, with sufficient power that the same was received at a location some fifteen miles distant from the point of interception.

(4) The return of the warrant was false. That is to say, in addition to the names of persons and the equipment employed in seizing conversations, as required by Georgia law, a certain Rex Armistead, Gerald W. Johnson, and another person whose name is unknown also heard the seized conversations at the time of their seizure. Additionally, equipment other than that specified in the warrant was employed in the seizure, specifically a radio receiver which was in the possession of Rex Armistead and others, and located in a motel in DeKalb County, Georgia, off of the intersection of I-20 and I-285.

3.

The above propositions are all capable of proof by one Gerald W. Johnson, and defendants attach hereto a portion of a deposition taken under oath of the said Johnson on February 5, 1976. Additionally,

there is attached, for the reference of the Court, an Annex of References relating portions of Johnson's testimony to divisions of the Opinion of the Supreme Court of Georgia dated January 27, 1976, as well as Enumerations of Error and portions of the Brief filed by defendants as appellants in the Supreme Court proceeding.

4.

The evidence, as outlined above, was not known by defendants, or by their counsel at any time prior to February 5, 1976, when it was discovered, as aforesaid. Additionally, defendants could not in the exercise of reasonable diligence have discovered said evidence, and submit the following for the consideration of the Court:

(a) Defendants' attorneys, prior to the trial of the case, wrote a letter to the said Gerald W. Johnson asking that they be permitted to interview him in preparation for the trial of the case. They were advised by Donald E. O'Brien, attorney for said Johnson, that he would not submit to an interview.

(b) The said Johnson, although listed as a witness for the State, was never called to testify in the trial.

(c) No testimony taken at the trial, or in any evidentiary hearing thereon, in any way indicated the existence of such evidence. To the contrary, the plain indications and all reasonable inferences drawn from the testimony of the

agents of the State were directly *contra* to the possible existence of such testimony. Specifically, defendants attach an extract of the trial transcript wherein agent Matthews, called as a witness for the State, testified concerning the playing of State's Exhibit 13 to Mr. and Mrs. Johnson. All logical and reasonable inferences from said Matthews' testimony would exclude the presence of any stranger, such as the said O'Brien, from the session at which the aforesaid tapes, State's Exhibit 13, were played for Mr. and Mrs. Johnson.

(d) If the sworn testimony of said Johnson is in fact true (that is to say, if the said Donald E. O'Brien were present during the playing of State's Exhibit 13) then that fact would be exculpatory in that it would bear heavily upon the admissibility of critical evidence sought to be used, and actually introduced, against defendants. Whereupon, the State, in the persons of the District Attorney and his assistants who prosecuted the case would be required under the doctrine contained in *Brady v. Maryland* to come forward with such evidence.

They did not do so.

WHEREFORE, defendants respectfully pray that the Court direct the State to show cause why a new trial should not be granted, and that it grant a new trial. In the alternative to the grant of a new trial, defendants pray that, in conjunction with the direction of the State to show cause why a new trial

should not be granted, it afford defendants an opportunity, by means of an evidentiary hearing, further to establish to the satisfaction of the Court the newly discovered evidence as hereinabove set forth.

CHARLES L. WELTNER

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Atlanta, Georgia 30303
658-9550

WESLEY R. ASINOF
Attorneys for Defendants

Box 471
Fayetteville, Georgia 30214

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter with a copy of this pleading personally.

This 17th day of February, 1976.

Attorney for Orkin

IN THE SUPERIOR COURT OF FULTON COUNTY STATE OF GEORGIA

THE STATE VS. WILLIAM B. ORKIN and BOBBY CHARLES BOWEN	INDICTMENT NO. A-22153 EXTRAORDINARY MOTION FOR NEW TRIAL

Hearing before The Honorable OSGOOD O. WILLIAMS on April 29, 1976, in Atlanta, Georgia.

TRANSCRIPT OF THE PROCEEDINGS

APPEARANCES OF COUNSEL:

On Behalf of the State:

CARTER GOODE, Esq.
WILLIAM WELLER, Esq.

On Behalf of Defendant Orkin:

CHARLES L. WELTNER, Esq.

On Behalf of Defendant Bowen:

WESLEY ASINOF, Esq.

• • •

THE COURT: All right, sir. I will note your motion in the record. Proceed for the Respondant.

MR. WELLER: Can we have just a few minutes, Your Honor?

MR. GOODE: If Your Honor please, we have the courage of our convictions. We will not put up any kind of showing.

THE COURT: All right, sir. You may proceed. Do you have any argument you are going to present to the Court?

MR. WELTNER: Yes, Your Honor.

THE COURT: All right, sir. You may proceed.

• • •

MR. WELTNER: All right, Your Honor. Mr. Asinof is prepared to present those to the Court.

MR. ASINOF: If Your Honor please —

• • •

THE COURT: I want to get your authority is what I want. Now, I remember everything that you have said here. I recall it vividly.

MR. ASINOF: I want to give you the authority, Your Honor.

THE COURT: All right.

MR. ASINOF: The case of *Giles versus Maryland* in the 386 U.S. page 66.

THE COURT: Now be sure and put it in your brief.

MR. ASINOF: Yes, sir, and *Brady versus Maryland*, 373 U.S. 83, and a legion of cases from the Circuit Courts of Appeal dealing with the question that what we have here is a withholding of evidence which is exculpatory to the defendants. Where the State, whether a demand is made or not, the cases are plain from the Supreme Court of the United States on down, that it is the duty of State's counsel to divulge to defense counsel any matters which may be exculpatory. Now, in addition thereto, Your Honor, as I said I will not argue the three points that are involved. But, I do want to call the Court's attention to the fact that we went in at length on the trial of this case on the question of probable cause for the issuance of the warrant and I would just like to mention the fact that the Supreme Court of Georgia in deciding this case, decided the question of probable cause on the theory that the only thing that the officers had according to the evidence was a declaration from Bowen, which was uncorroborated and unsupported by any other evidence. Not one time did State's counsel ever advise us, and we went into this at length on cross-examination of the trial of the case, Mr. Matthews. At no time did they ever mention the fact that Mr. Johnson had stated to them at the time that he was first taken into protective custody, that the only person that he could think of that wanted to kill him was Orkin. This was an additional fact that the Supreme Court did not have before it. The Supreme Court further recognized and said this is a close question dealing with both these questions. The Subsection K question and the other. And here were two material facts that were withheld from us. We had no way. I want to also point out this to the

Court, that the letter that was sent by Judge Pye that was sent to the Johnsons, that Judge Pye had made a motion before Your Honor that he be given a Court Order to interview these witnesses. The Court refused that. But, of course, gave him, naturally he had the right to interview so he sent a letter and this is in evidence. But yet the Johnsons went to the trouble of getting an attorney and said they would make no — or they would give no statement and they would not consent to an interview. So therefore there was certainly diligence on the part of counsel in trying to find out in advance.

* * *

IN THE SUPERIOR COURT OF FULTON COUNTY STATE OF GEORGIA

STATE OF GEORGIA
VS.
WILLIAM B. ORKIN
and
BOBBY CHARLES BOWEN

No. A-22153

ORDER

The Defendants' Extraordinary Motion for a New Trial of Newly Discovered Evidence filed in this Court on the 25th day of March, 1976, is hereby overruled on each and every ground thereof.

SO ORDERED, this 1st day of June, 1976.

Osgood O. Williams
Judge, Fulton Superior Court
Atlanta Judicial Circuit

FILED
SEP 26 1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-345

WILLIAM B. ORKIN AND
BOBBY CHARLES BOWEN,

Petitioners,

versus

THE STATE OF GEORGIA,

Respondent.

RESPONSE TO
PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE
STATE OF GEORGIA

Lewis R. Slaton
District Attorney
Atlanta Judicial Circuit

Counsel for Respondent

TABLE OF AUTHORITIES

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4 J. Wigmore, Evidence, Chadbourne Rev., Sec. 1079 at p. 186 7

6 J. Wigmore, Evidence (3rd Ed.) Sec. 1769 at 184 7

IN THE

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OCTOBER TERM, 1977

No. _____

WILLIAM B. ORKIN AND
BOBBY CHARLES BOWEN,
Petitioners,

versus

THE STATE OF GEORGIA,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

The State of Georgia respectfully presents this response to show that the writ should not be granted.

OPINIONS BELOW

JURISDICTION

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

QUESTIONS PRESENTED
(Omitted, Rule 40(3))

STATEMENT OF THE CASE

The Petitioners' statement omits the following controlling facts:

On the hearing of the Motions to Suppress the recorded conversations between Orkin and Bowen on June 20, 1974, filed on behalf of Orkin and Bowen, and commencing on August 27, 1974, Mr. Weller, Assistant District Attorney, of counsel for the State, in an opening statement summarizing the State's evidence said in connection with the intended victim, Gerald Johnson:

> "This is in the conversation on June the 20th at 11:30 A.M. After that, the victim was brought to the district attorney's office from his office and subsequently in the afternoon a court order was obtained from Judge Tidwell at approximately 6:40 P.M." (Motion Transcript, p. 23).

During this hearing, Assistant District Attorney Weller addressed the following question to witness Gene A. Matthews, a district attorney's investigator:

> "Now with respect, at that point in time, June 20th, at 11:30 A.M., after this conversation, did you and Mr. Matthews then go and see the victim, Mr. Jerry Johnson?"

After correcting the interrogator to name his associate, Matthews testified:

> "Mr. Hewatt and I went to the Equitable Building and to the Equitable Life Insurance Company and interviewed Mr. Gerald Johnson." (Motion Transcript, p. 124).

Matthews went on to testify that later on June 20, 1974, he signed an affidavit before Judge Tidwell and was present when Judge Tidwell signed a wiretap order at 6:40 P.M. on the same date (Motion Transcript, pp. 124, 125).

Later in the same hearing, during cross-examination of the same witness, Matthews, by Mr. Asinof, then and now Bowen's counsel, the following transpired:

> "Q (By Mr. Asinof) Now, were you present before Judge Tidwell on June the 20th at the time that he granted the order to seize the conversations and record the conversations of Mr. Bowen and other unknown persons?
> A (By Mr. Matthews) Was I present?
>
> Q Yes sir.
> A When he signed it?
>
> Q Yes sir.
> A Yes sir.
>
> Q And did you at that time attempt in any way to relate to Judge Tidwell any of the facts upon which you were relying as a basis for Billy Orkin's connection with the conspiracy?
> A Yes sir.
>
> Q You did? Was that under oath?
> A Yes sir.
>
> Q Did you tell Judge Tidwell under oath at that time that the—any of the items which you believe to constitute a probable cause to believe that Mr. Orkin was a conspirator?
> A Yes sir."

On the trial, Orkin testified that at some time prior to June, 1974, Mrs. Johnson told him that she had in-

formed her husband that she and Orkin were "in love"; further, that Mrs. Johnson had called him, Orkin, on one occasion in March (1974) to warn him that Johnson might be "looking for him." (Trial Transcript, pp. 1444-1447).

ARGUMENT

1. THE RECORD DOES NOT SUPPORT PETITIONERS' CLAIM OF A KNOWING AND DELIBERATE VIOLATION OF 18 U.S.C. SEC. 2518(1)(b)(iv) BY THE STATE'S REPRESENTATIVES.

The testimony of witness Matthews that he interviewed Gerald Johnson on June 20, 1974, and later under oath related to the judge who issued the wiretap order "facts upon which you were relying as a basis for Billy Orkin's connection with the conspiracy" and "items which you believe to constitute a probable cause to believe that Mr. Orkin was a conspirator" completely negates the claim that the State deceived the judge.

When the district attorney and the judge considered the matter of naming Orkin in the application and order they were necessarily influenced by the fact that he was a business man with an excellent reputation (called "sterling" in the petition). The decisions on the point involve persons who were known by reputation or by prior convictions or both to be in some way involved in or closely connected with persons involved in professional gambling. Orkin certainly had no such background as to murder. There was always the possibility that the whole thing was a personal project of Bowen's thought up by him alone from some misguided sense of loyalty, or perhaps based

on some chance remark of Orkin in his presence of the same nature as the remark of Henry II in the presence of the four knights who took it as a command to murder Archbishop Becket.

In the close factual situation, good judgment and fairness are good reasons for omitting the name of Orkin from the papers.

2. THE RECORD DOES NOT SUPPORT PETITIONERS' *BRADY* CLAIM OF PROSECUTORIAL MISCONDUCT.

Assistant District Attorney Weller's statement on the Motion hearing that after 11:30 A.M. and before a court order was obtained, on June 20, 1974, "the victim was brought to the district attorney's office from his office" and the testimony of investigator Matthews that "Mr. Hewatt and I went to the Equitable Building and to the Equitable Life Insurance Company and interviewed Mr. Gerald Johnson" on June 20, 1974, after 11:30 A.M. and before going to the judge to obtain a wiretap warrant, notified Orkin and Bowen that the State's representatives had met and talked with Gerald Johnson.

Orkin's testimony on the trial that Mrs. Johnson had, prior to June, 1974, informed him that she had told Gerald Johnson, her husband, that she and Orkin were "in love" with each other and that on the occasion in March she had called him to warn him that Johnson might be "looking for him" showed that Orkin was aware that Johnson knew of the love affair and that Johnson felt some animosity toward him because of the situation.

The trial judge was right when he overruled the extraordinary motion for a new trial wherein Petitioners claimed that the fact that Johnson told the State's agents that Mrs. Johnson and Orkin had been and were emotionally involved and that he could think of no one but Orkin who might want him killed was newly discovered; the Supreme Court of Georgia was correct in holding Johnson's testimony cumulative. Direct evidence establishing what had already been proved circumstantially can not be called new or newly discovered evidence.

Matthews' testimony that he related to the judge who signed the wiretap order, under oath, facts connecting Orkin with the conspiracy, after he had interviewed Johnson, certainly destroys any inference that anything was being hidden from anybody.

There was nothing whatever to prevent Orkin's counsel from asking Matthews what Johnson told the State's agents on June 20, 1974, on cross-examination. The reasons for failure to inquire are obvious: everyone in the courtroom knew that Matthews would answer that Johnson related his wife's involvement with Orkin and expressed no surprise that Orkin might wish him dead and that he relayed this in substance to Judge Tidwell.

Petitioners fail to point out how *Brady v. Maryland*, 373 U.S. 83 (1963) and *United States v. Agurs*, 427 U.S. 97 (1976), explaining *Brady*, apply. The fact that the State's agents had talked with Johnson before the wiretap order was applied for was apparent from Weller's statement and Matthews' testimony, both quoted. Petitioners claim that they did not know that Johnson had met with agents of the State fails.

3. THERE IS NO MERIT IN ORKIN'S CONTENTIONS REGARDING THE ADMISSION OF BOWEN'S STATEMENTS.

The statements in question, as is conceded in the petition, clearly would have been admissible under the Federal Rules of Evidence and decisions of the federal courts, had petitioners' trial been held in a federal court. Their admissibility under Georgia law was beyond doubt. Any examination into the present validity of the theory of admissibility under which the statements came in must necessarily bring in question Federal Rules of Evidence, Rule 801(d)(2)(E) and a long line of decisions by the federal courts (e.g., *Logan v. United States*, 144 U.S. 263, 12 S.Ct. 617 (1892)). Strictly speaking, the statements were not hearsay. Rule 801(d)(2)(E); 4 J. Wigmore, Evidence, Chadbourne Rev., Sec. 1079 at p. 186; 6 J. Wigmore, Evidence (3rd Ed.) Sec. 1769, at 184. However, such statements are commonly referred to as admissible under an exception to the hearsay rule. Petitioners are not taking the position that widespread injustice is resulting from the admission of statements by co-conspirators, or even injustice to them, but simply that a rule of non-admissibility might have resulted in their aquittal. (The sufficiency of the evidence to support the verdict of guilty was conceded in the direct appeal to the Supreme Court of Georgia.)

The decision of the Supreme Court of Georgia is in accord with *Dutton v. Evans*, 400 U.S. 74 (1970), with decisions of this Court prior to Dutton, and with current decisions of the lower federal courts applying the Federal Rules of Evidence.

Petitioners assume that they can now file their petition seeking review of the decision of the Supreme Court of

Georgia on the direct appeal, in which a motion for a rehearing was denied February 11, 1976 (236 Ga. 1976), as a matter of right. This appears questionable, since when the motion for a rehearing was denied, the judgment became final and subject to review under Rule 22(1). An extraordinary motion for a new trial under Georgia practice is not a further step in the same case, but a new proceeding. *Cox v. State*, 19 Ga. App. 283(2), 91 S.E. 422; *Powell v. Weeks*, 54 Ga. App. 468, 188 S.E. 263; *Federal Investment Co. v. Ewing*, 166 Ga. 246(2-5); 141 S.E. 65. Decisions such as *Reece v. State of Ga.*, 350 U.S. 85 (1955), where a new trial was granted on the direct appeal appear to be distinguishable. Since the ninety day requirement is not jurisdictional, there is no doubt that the Court can accept a petition eighteen months late, which may be what Petitioners are asking the Court to do as respects their third and fourth questions.

4. PETITIONERS' CLAIM OF GRAND JURY DISCRIMINATION IS WITHOUT MERIT.

Respondent relies on the pertinent portion of the opinion of the Supreme Court of Georgia in support of respondent's contention (*Orkin v. State*, 236 Ga. 176, 223 S.E.2d 61, set forth *in extenso* as Appendix A to the petition; pertinent portion commences at petition, p. 10a).

CONCLUSION

Petitioners make no case for the grant of the writ.

Respectfully submitted,

LEWIS R. SLATON
District Attorney
Atlanta Judicial Circuit

CARTER GOODE
Assistant District Attorney
Atlanta Judicial Circuit

Attorneys for Respondent
The State of Georgia

CERTIFICATE OF SERVICE

I certify that I have served the foregoing petition by depositing copies of same in the United States Mail with sufficient postage affixed to assure delivery, addressed to Petitioners' counsel:

Mr. Hugh M. Dorsey, Jr.
3300 First National Bank Tower
Atlanta, Georgia 30303

Mr. Wesley R. Asinof
New Hope Road
Fayetteville, Georgia 30214

This _____ day of _____, 1977.

LEWIS R. SLATON
District Attorney
Atlanta Judicial Circuit

Attorney for Respondent
The State of Georgia